

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**



**FILED**

11-04-14  
04:59 PM

Investigation on the Commission's Own  
Motion into the Operations, Practices, and  
Conduct of Comcast Phone of California, LLC  
(U-5698-C) and its Related Entities  
(Collectively "Comcast") to Determine  
Whether Comcast Violated the Laws, Rules,  
and Regulations of this State in the  
Unauthorized Disclosure and Publication of  
Comcast Subscribers' Unlisted Names,  
Telephone Numbers, and Addresses.

Investigation 13-10-003  
(Filed October 3, 2013)

**COMCAST PHONE OF CALIFORNIA, LLC (U 5698 C)  
AND RELATED ENTITIES POST-HEARING OPENING BRIEF  
[PUBLIC VERSION]**

Peter Karanjia  
Michael Sloan  
Davis Wright Tremaine LLP  
1919 Pennsylvania Avenue, N.W.,  
Suite 800  
Washington, D.C. 20006-3401  
Tel: (202) 973-4200  
Fax: (202) 973-4499  
Email: peterkaranjia@dwt.com  
          michaelsloan@dwt.com

Suzanne Toller  
Jane Whang  
Garrett Parks  
Davis Wright Tremaine LLP  
505 Montgomery Street, Suite 800  
San Francisco, CA 94111-6533  
Tel. (415) 276-6500  
Fax. (415) 276-6599  
Email: suzannetoller@dwt.com  
          janewhang@dwt.com  
          garrettparks@dwt.com

Attorneys for Comcast

Dated: November 4, 2014

## TABLE OF CONTENTS

EXECUTIVE SUMMARY .....	1
I. PARTIES, QUESTIONS PRESENTED, AND SUMMARY OF RECOMMENDATIONS .....	3
A. The Comcast Entities Named in this Proceeding.....	3
B. Summary of Recommendations (Rule 13.11).....	5
C. Questions Presented .....	6
II. BACKGROUND .....	7
A. Regulatory Background .....	7
B. Procedural Background.....	9
III. FACTUAL ISSUES .....	11
A. The Inadvertent Release Resulted from an Anomaly in a Data Extraction Process Used to Identify Non-Published Directory Listings .....	11
B. The Extent and Duration of the Release of Non-Published Listings .....	13
C. Comcast First Identified the Process Error in November 2012 .....	15
D. Once the Error was Identified, Comcast Promptly Fixed it and Deleted the Listings.....	17
E. Comcast's Disclosures to Customers about Non-Published Service are Clear, Reasonable, and Consistent with Industry Practice .....	17
F. Comcast Used Reasonable Efforts to Notify Customers, Refund Non-Published Fees, and Provide Redress Options.....	20
G. Since Discovering the Release, Comcast has Strengthened Its Policies and Procedures to Protect Customers' Non-Published Listings .....	23
IV. LEGAL ARGUMENT .....	25
A. The Commission Lacks Jurisdiction Over this Matter .....	25
1. Section 710 Bars this Investigation.....	25
2. The Commission Lacks Authority to Enforce the .....	28
B. SED Must Demonstrate by a Preponderance of the Evidence That Comcast Phone Violated the Law .....	31
C. Even Assuming it Has Jurisdiction, the Commission Cannot Establish Any Violation of Law .....	31
1. The Commission Cannot Establish a Violation of the Constitutional Right to Privacy .....	31
2. The Commission Cannot Establish a Violation of PU Code §§ 2891.1 or 2891.....	33
a. <i>Section 2891.1(a) does not apply where, as here, a regulated telephone company did not sell or license its own unlisted/unpublished numbers.</i> .....	34

<i>b. Even if this investigation focuses solely on Comcast Phone’s provision of interconnection service, Comcast Phone still cannot be held liable for violating Section 2891.1</i> .....	36
<i>c. SED has not alleged that Comcast violated Section 2891 and, thus this claim fails as a matter of law.</i> .....	38
3. The Commission Cannot Establish a Violation of PU Code § 451 .....	38
D. No Penalty Should Be Imposed .....	40
1. Commission Precedent Establishes that No Penalty is Appropriate.....	41
2. Comcast’s Voluntary Reporting, Rectification of the Error, and Full Cooperation in this Proceeding Confirm No Penalty is Appropriate .....	43
3. There Was No Unaddressed Serious Harm .....	44
4. A Penalty Is Not Necessary for Effective Deterrence .....	44
5. The Totality of the Circumstances Weigh in Favor of Mitigating any Penalty .....	45
V. CONCLUSION .....	46

## **TABLE OF AUTHORITIES**

### **Cases**

<i>Casey v. U.S. Bank Nat'l Ass'n</i> , 127 Cal. App. 4th 1138, 26 Cal. Rptr. 3d 401 (2005).....	35
<i>Costa Amended Purchase and Sale Agreement</i> , D.13-04-032 .....	31
<i>Delaney v. Baker</i> , 20 Cal. 4th 23 (1999) .....	32
<i>Folgelstrom v. Lamps Plus, Inc.</i> , 195 Cal. App. 4th 986 (Cal. Ct. App. 2011) .....	32
<i>Hill v. Nat'l Collegiate Athletic Ass'n</i> , 7 Cal. 4th 1 (1994) .....	32
<i>In re iPhone Application Litig.</i> , 844 F. Supp. 2d 1040 (N.D. Cal. 2012) .....	32
<i>In re Yahoo Mail Litig.</i> , 2014 WL 3962824 (N.D. Cal. Aug. 12, 2014) .....	32, 33
<i>Knell v. Pacific Bell and AT&amp;T</i> , D.03-08-025 .....	30
<i>OII of Pacific Bell d/b/a Cingular</i> , D.04-09-062 .....	38
<i>Re Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates</i> , D.98-12-075, 1998 Cal. PUC LEXIS 1016 .....	43
<i>Ruiz v. Gap, Inc.</i> , 540 F. Supp. 2d 1121 (N.D. Cal. 2008), <i>aff'd</i> , 380 Fed. Appx. 689 (9th Cir. 2010).....	32

### **California Public Utilities Commission Decisions**

D.96-10-064, <i>In re Application of TCI Telephone for a CPCN</i> .....	3
D.98-04-044, <i>OII into Whether the Operating Authority of David Martinez Espinoza should be revoked</i> , Cal PUC LEXIS 409 <sup>1</sup> .....	31
D.98-12-075, <i>Re Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates</i> , 1998 Cal PUC LEXIS 1018 .....	12, 40, 41, 44

<sup>1</sup> Lexis cites are provided for August pre-2000 decisions that are not available on the Commission's website.

D.99-03-019, <i>In Re Joint Application of AT&amp;T Corp. et. al. for Approval for the Change in Control of TCI Telephony Services of California, Inc. (U-5698-C)</i> , 1999 Cal. PUC LEXIS 382 .....	3
D.00-04-029, <i>Bercovitch v. SDG&amp;E</i> .....	31
D.01-07-032, <i>OII of Competitive Access to Customer List Information</i> .....	30
D.01-11-062, <i>OIR into Competition for Local Exchange Service</i> (Interim Opinion Relating to Pacific Bell and Cox Tainted San Diego Directories).....	41, 42, 43
D.02-11-025, <i>In re Application of Comcast Business Communications, Inc. for Approval of Change of Control</i> .....	3
D.03-08-025, <i>Knell v. Pacific Bell and AT&amp;T</i> .....	30, 41, 42
D.06-03-013, <i>OIR to Establish Consumer Rights and Protection Rules Applicable to All Telecommunication Utilities</i> .....	30
D.14-08-033, <i>OII into the Operations, Practices, and conduct of Telseven, LLC et al.</i> .....	31
<b>California Public Utilities (PU) Code</b>	
PU Code Section 239 .....	26
PU Code Section 239(a)(1)(C).....	26
PU Code Seciton 451 .....	6, 38, 40
PU Code Section 2101 .....	29
PU Code Section 2107 .....	40, 44
PU Code Section 2111 .....	7, 35
PU Code Section 2891 .....	6, 33, 38
PU Code Section 2891.1 .....	<i>passim</i>
PU Code Section 2891.1(a).....	<i>passim</i>
PU Code Section 2891.1(h) .....	35
PU Code Section 2891(a)(1).....	38
PU Code Section 2891(a)(2).....	38
PU Code Section 2891(a)(3).....	38
PU Code Section 710 .....	<i>passim</i>
PU Code Section 710(a).....	25, 26
PU Code Section 710(c).....	26, 27
PU Code Section 710(c).....	33
PU Code Section 710(d) .....	33

## California Evidence Code

Cal. Evid. Code § 452 .....	19
Cal. Evid. Code § 453 .....	19

## California Public Utilities Commission Rules

Rule 13.11 .....	1, 5
Rule 13.9 .....	19

## California Constitutional Provisions

Cal. Const. Article I .....	5, 7, 30
Cal. Const. Article V, § 13 .....	29

## Other Authority

<i>Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, et al.</i> , Third Report and Order, et al., 14 FCC Rcd. 15550 ¶ 86 (1999) .....	8
<i>Provision of Directory Listing Information Under Telecommunications Act of 1934</i> , First Report and Order, 16 F.C.C.R. 2736 (2001) .....	8
<i>Time Warner Wholesale Order</i> , WC Docket No. 06-55, DA 07-09, Memorandum Opinion and Order, 20 FCC Rcd 3513 (2007) .....	3
Rest.2d Torts, § 500 .....	32

## Statutes

47 U.S.C. § 222 .....	38
47 U.S.C. § 222(e) .....	8
47 U.S.C. § 251(b)(3) .....	8

**COMCAST PHONE OF CALIFORNIA, LLC (U 5698 C)  
AND RELATED ENTITIES POST-HEARING OPENING BRIEF [PUBLIC VERSION]**

Pursuant to Rule 13.11 of the California Public Utilities Commission's ("CPUC" or "Commission") Rules of Practice and Procedure and the schedule established by Administrative Law Judge ("ALJ") Burcham at the conclusion of the evidentiary hearing on October 3, 2014, Comcast Phone of California, LLC (U 5698 C) ("Comcast Phone") and Related Entities named in the above-captioned Order Instituting Investigation ("OII") (collectively, "Comcast") respectfully submit this Opening Brief.

**EXECUTIVE SUMMARY**

Comcast IP Phone II, LLC ("Comcast IP") provides Voice over Internet Protocol ("VoIP") service to residential customers in California under the XFINITY Voice brand. Due to a data processing error, Comcast inadvertently released for publication the non-listed or non-published listings<sup>1</sup> of approximately 74,000 residential XFINITY Voice subscribers in California (the "Release"). These listings were predominantly published on Comcast's online directory, Ecolisting.com ("Ecolisting"). Comcast deeply regrets the inadvertent Release of the non-published listings. But the evidence conclusively demonstrates that as soon as Comcast identified the underlying error that caused the Release (the "Process Error"), it took immediate steps to fix it, to remove all mistakenly released listings from Ecolisting and from circulation, to

---

<sup>1</sup> A non-published listing for Comcast's XFINITY Voice service means that the customer's phone number will not be made available by Comcast for online or paper directory publishing or for directory assistance. "Non-listed," which is no longer available, except for grandfathered customers, means that listings are not made available by Comcast for publishing in paper or online directories, but are available for directory assistance. For convenience, we use the term "non-published" to refer to both non-published and non-listed numbers. *See* Exh. Com 103/103C (Donato) at 5, Att. A. Pursuant to the agreement between SED and Comcast, as memorialized by email to ALJ Burcham on September 24, 2014, SED and Comcast agreed to refer to Comcast's "exhibits" to its witness testimony as "attachments" instead of as exhibits.

notify all customers impacted by the Process Error (“Affected Customers”), and to provide them with refunds and additional redress as appropriate. On a going forward basis, Comcast has also made numerous improvements to further strengthen its directory listing processes, including implementing measures to validate the accuracy of the listing data, improving procedures for investigating complaints, and commissioning an internal audit team to conduct a comprehensive and ongoing assessment of Comcast’s practices and procedures. Comcast also promptly notified the Commission and Attorney General’s Office (“AG”) about the Release, and has cooperated with both offices in responding to hundreds of data requests.

Despite these efforts by Comcast, the Commission initiated this proceeding to investigate whether, as a result of the inadvertent Release, Comcast violated the Public Utilities Code (“PU Code”) and other laws and determine whether any penalties should be assessed.<sup>2</sup> As explained below, the Commission should dismiss the investigation because it is foreclosed by PU Code § 710,<sup>3</sup> which specifically prohibits the Commission from “exercis[ing] regulatory jurisdiction or control” over VoIP services. To the extent the Commission finds it has authority to pursue the investigation, however, it should find no violation of law for the reasons detailed below. And finally, if the Commission finds any violation of law, it should not impose any penalties because the Release was inadvertent, and Comcast promptly reported the issue, fixed it, provided redress to customers, and took significant steps to improve its processes.

---

<sup>2</sup> See OII at 19.

<sup>3</sup> All “Section” cites are to the Public Utilities Code unless indicated otherwise.



## **I. PARTIES, QUESTIONS PRESENTED, AND SUMMARY OF RECOMMENDATIONS<sup>4</sup>**

### **A. The Comcast Entities Named in this Proceeding**

Ordering Paragraph 1 of the OII identified four Comcast entities as respondents. Those entities are listed below, along with a brief explanation of their involvement in providing voice services. Although the OII focuses in detail on the alleged roles of Comcast Phone and Comcast IP with respect to the Release, it makes *no* allegations—and the Safety and Enforcement Division (“SED”) has offered no evidence – that the remaining two respondents, Comcast Phone, LLC or Comcast Cable Communications Management, LLC, were involved in the Release. And, as a factual matter, they were not. Accordingly, these two respondents should be dismissed from the proceeding.

Comcast Phone is a competitive local exchange carrier (“CLEC”) certificated by the Commission to provide facilities-based local and inter-exchange telecommunications services.<sup>5</sup> Comcast Phone does not offer retail voice services to residential customers. Instead, it primarily provides wholesale interconnection services enabling VoIP service providers to originate and terminate calls from the public switched telephone network (“PSTN”), and related functionality.<sup>6</sup>

---

<sup>4</sup> Filed herewith as Appendix 1 is a side-by-side comparison of the issue headings approved by ALJ Burcham and the issue headings Comcast has used in its brief. For the most part, Comcast’s headings identically track those in the approved outline, but in a couple of instances, Comcast collapsed separate subheadings into a single subheading to improve readability. Comcast’s attached appendix includes the above-referenced comparison of outlines, previously admitted Exh. Com 103/103C (Donato), Att. C, two tariffs Comcast has concurrently moved for the Commission to take official notice of, and the legislative history of § 2891.1(a).

<sup>5</sup> See *Re US Telecom Certificate of Public Convenience and Necessity Application*, Decision No. (“D.”) 96-10-064, 1996 Cal. PUC LEXIS 1014 (granting a CPCN to TCI); *In re Joint Application of AT&T Corp. et al for Approval for the Change in Control of TCI Telephony Services of California, Inc. (U-5698-C)*, D.99-03-019, 1999 Cal. PUC LEXIS 382; *In re Application of Comcast Business Communications, Inc. for Approval of Change of Control*, D.02-11-025 (merger of AT&T Broadband Phone with Comcast Business Communications, Inc.).

<sup>6</sup> Exh. Com 101/101C (Munoz) at 11. Comcast Phone’s provision of interconnection services to the PSTN is governed by a LIS Agreement. Exh. Com 101/101C (Munoz), Att. C. The FCC has recognized the legitimacy of this type of arrangement between CLECs like Comcast Phone and VoIP providers like Comcast IP. See *Time Warner Wholesale Order*, WC Docket No. 06-55, DA 07-09, Memorandum

Comcast IP is *not* a telephone corporation regulated by the Commission. It provides residential VoIP services under the trade name XFINITY Voice.<sup>7</sup> As a VoIP provider, Comcast IP does not have interconnection rights or the ability to obtain telephone numbers on its own.<sup>8</sup> Instead, it obtains those services on a wholesale basis from Comcast Phone, pursuant to Comcast Phone's tariffed "Local Interconnection Service" ("LIS").<sup>9</sup> Once it obtains telephone numbers through Comcast Phone, Comcast IP assigns those telephone numbers to its XFINITY Voice customers.<sup>10</sup> The listings that are the subject of this proceeding are those of *Comcast IP's* residential VoIP customers, not the listings of *Comcast Phone's* wholesale customer (Comcast IP).<sup>11</sup>

Comcast Phone, LLC is the parent corporation of Comcast Phone and an affiliate of the other Comcast respondents.<sup>12</sup> It does not provide residential voice services in California<sup>13</sup> and SED has neither alleged that this entity played any role in the Release, nor is there any evidence that it did so. This entity should accordingly be dismissed from the proceeding.

---

Opinion and Order, 20 FCC Rcd 3513 (2007). The details of this arrangement are described *infra*, at Section II(A).

<sup>7</sup> Exh. Com 101/101C (Munoz) at 9.

<sup>8</sup> See, *infra*, at Section II(A).

<sup>9</sup> SED cited and attached Comcast's LIS Guide to its Response to Comcast's Motion to Dismiss as Attachment A. See SED Response to Motion to Dismiss (Dec. 6, 2014) ("SED Response to Motion to Dismiss"), Attachment A. The LIS Guide may also be found at: <http://www.comcast.com/Corporate/About/PhoneTermsOfService/Circuit-Switched/CDPLocalInterconnectionService.html>.

<sup>10</sup> Administrative Law Judge's Ruling Denying Comcast's Motion to Dismiss ("Motion to Dismiss Ruling") at 7 (after Comcast Phone obtains the numbers, "Comcast IP assigns [the numbers] to its residential XFINITY Voice subscribers.").

<sup>11</sup> See Exh. 101/101C (Munoz) at 14-15, Att. C.

<sup>12</sup> Exh. Com 101/101C (Munoz) at 11.

<sup>13</sup> Exh. Com 101/101C (Munoz) at 10.

Comcast Cable Communications Management, LLC is an affiliate of the other Comcast respondents, and is a contracting entity for various directory listing agreements with Neustar,<sup>14</sup> but it does not provide retail voice services.<sup>15</sup> As with Comcast Phone, LLC, SED has never alleged (not could it, based on the evidence) that this entity played any role in the Release nor is there any evidence that it did so.<sup>16</sup> This entity should also be dismissed from this proceeding.

**B. Summary of Recommendations (Rule 13.11)**

This proceeding should be dismissed on the threshold ground that PU Code § 710 flatly prohibits the Commission from “exercis[ing] regulatory jurisdiction or control” over VoIP services—which is exactly what the Commission purports to do here. In light of the undisputed fact that the Release involved listings issued by a VoIP provider (Comcast IP) to customers purchasing a VoIP service (XFINITY Voice), Section 710 categorically bars the Commission’s assertion of regulatory jurisdiction. Nor does the Commission have jurisdiction to enforce the right to privacy under Article I of the California Constitution.

Even if the Commission had jurisdiction, it cannot find any violation of the PU Code or any other provision of law. *First*, setting aside the fact that the Commission has no authority to enforce the right to privacy in Article I of the California Constitution, Comcast’s conduct does not rise to the high level of an “egregious breach of social norms” sufficient to establish a constitutional privacy claim.

---

<sup>14</sup> Neustar, Inc. (“Neustar”) is the directory listing agent for Comcast. Targus Information Corporation had previously been Comcast’s directory listing agent and is now a wholly owned subsidiary of Neustar known as Neustar Information Services, Inc. *See* Exh. Com 104/104C (Donato) at Att. D, ¶¶ 1, 3.

<sup>15</sup> Exh. Com 101/101C (Munoz) at 11.

<sup>16</sup> SED broadly alleges that Comcast Phone, LLC and Comcast Cable Communications Management, LLC were potential “aiders and abettors” without providing factual support for its allegations other than that the entities were either a signatory (Comcast Phone, LLC) or a party (Comcast Cable Communications Management, LLC) to the Directory Listing License and Distribution Agreement with its agent Neustar, Inc. *See* SED Response to Motion to Dismiss at 12, 17.

*Second*, the Commission cannot establish a violation of PU Code § 2891.1. Section 2891.1 prohibits a telephone corporation from publishing its own customers' unlisted telephone numbers. But the VoIP listings at issue here are *not* those of Comcast Phone (the only telephone corporation before the Commission). The listings are those of Comcast IP, a VoIP provider, and Section 2891.1, by its terms, does not apply to VOIP providers or VoIP service. Further, there can be no violation of that provision where, as here, the obligation to ensure the accuracy of the non-published numbers rested on Comcast IP (not Comcast Phone).

*Third*, the Commission also cannot determine that there was a violation of Section 2891, as there are no facts or allegations in the record to support such a claim.

*Fourth*, there has been no violation of Section 451. That provision prohibits "unjust and unreasonable" practices, but the evidence here establishes that Comcast had reasonable practices and procedures in place to protect against the publication of non-published listings and that the Release was the result of an unforeseen and inadvertent data processing anomaly. Further, after discovering the Process Error, Comcast acted diligently to fix the underlying issue, and to notify and provide redress to Affected Customers.

Finally, even if the Commission were to find any violation of the law, Commission precedent dictates that no penalty should be imposed. The evidence establishes that the Release was unintentional. Comcast has accepted responsibility for its mistake, acted quickly to correct it, and took extraordinary steps to make things right. The considerable expense and effort it has already expended is deterrence enough, and imposing punitive measures would serve no valid public interest.

### **C. Questions Presented**

As a threshold matter, the Commission must decide whether Section 710 bars this action. If the Commission determines that it does not, then the following questions are presented:

(i) does the Commission have jurisdiction to enforce the right to privacy in Article I of the California Constitution?

(ii) did Comcast Phone violate Article I of the California Constitution,<sup>17</sup> Sections 2891.1, 2891 or 451?<sup>18</sup> If the answer to this question is yes, the Commission must then decide:

(iii) did Comcast Phone's affiliates aid and abet any violations under PU Code § 2111?<sup>19</sup> If the Commission finds any violations of law, then it must determine:

(iv) whether it should assess any penalties or fines pursuant to Sections 2107 and 2108, and/or impose any remedial measures?<sup>20</sup>

## **II. BACKGROUND**

### **A. Regulatory Background**

A "directory listing" is a data record containing an end-user's name, phone number, street address, and related information such as whether the listing should be non-published.

Compilations of directory listings are published in paper and electronic directories and used to provide directory assistance services (i.e., "411"). Local telephone companies (local exchange carriers or "LECs"), and providers of VoIP service like Comcast IP, generate directory listing information in the ordinary course of providing service to their retail end-user customers.

When Congress abolished local telephone monopolies in the Telecommunications Act of 1996 ("1996 Act"), it also took steps to open the market for directory listings by requiring LECs

---

<sup>17</sup> This part of the question only arises if the Commission finds that it has jurisdiction to enforce the Constitutional right to privacy in (i) above.

<sup>18</sup> See February 11, 2014, Assigned Commissioner's Scoping Memo and Ruling ("Scoping Memo") at 4-5. Although the Scoping Memo identifies broadly violations of other PU Code sections or law as potential issues, to date SED has failed to present any evidence or other theories as to any other violations of law. To the extent that SED alleges any other violations in its opening brief, Comcast reserves the right to respond to such allegations on reply.

<sup>19</sup> Thus far, SED has not articulated how Comcast Phone's affiliates aided and abetted a violation of the PU Code in a manner that implicates Section 2111. Comcast reserves its right to respond to any such allegations in its reply brief.

<sup>20</sup> Scoping Memo at 5.

to share their directory listing information with other LECs and directory publishers.<sup>21</sup> By subjecting LECs to those sharing obligations, the 1996 Act created a competitive, independent directory publishing business. It also promoted competition in the telecommunications market by preventing providers from excluding their competitors' listings from phone books, online directories, and directory assistance databases.<sup>22</sup>

When this pro-competitive framework was first implemented in the mid-1990s, the common practice, codified in interconnection agreements between competitive LECs ("CLECs") and incumbent LECs ("ILECs") was for CLECs to submit their customers' directory listing information to the ILECs. The ILECs then maintained a complete repository of all listings in a given service territory and published the listings in printed telephone books and used them to provide directory assistance.<sup>23</sup>

Over time, however, the popularity of traditional printed phone books declined. In light of this, the cost Comcast incurred in providing listings to ILECs and directory publishers through the legacy publication process, and increased awareness of environmental concerns, Comcast decided to move away from this legacy business model and to create its own online directory, Ecolisting.<sup>24</sup> At the same time, instead of directly providing its listings to ILECs, competitive providers, and directory listings publishers, Comcast chose Neustar to serve as its directory

---

<sup>21</sup> See 47 U.S.C. §§ 251(b)(3) and 222(e).

<sup>22</sup> *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, et al.*, Third Report and Order, et al., 14 FCC Rcd. 15550 ¶ 86 (1999) ("Congress enacted Section 222(e) to correct a perceived failure in the market for subscriber list information. All directory publishers require timely and complete access to accurate subscriber list information in order to compete effectively.").

<sup>23</sup> Under the FCC's rules, ILECs are permitted to do with this information as they see fit. *Provision of Directory Listing Information Under Telecommunications Act of 1934*, First Report and Order, 16 F.C.C.R. 2736, ¶ 28 (2001) ("Once carriers or their agents obtain access to the DA [directory assistance] database, they may use the information as they wish, as long as they comply with applicable provisions of the Act and our rules. This latitude in the use of DA information includes permitting a carrier's DA agent to use the information as it sees fit."); Exh. Com 102 (Munoz), at 9, fn. 21.

<sup>24</sup> See Exh. Com 107/107C (Miller) at 3-4; Exh. Com 103/103C (Donato) at 9-10.

listing distribution agent to do two things: (i) license and distribute Comcast directory listings to eligible requesting directory publishers and LECs; and (ii) compile Comcast's listings, along with other providers' listings, for Ecolisting. Comcast launched the Ecolisting website in July 2010.<sup>25</sup>

## **B. Procedural Background**

Comcast voluntarily notified the Commission and the AG's Office of the Release (described in more detail below, *see* Section III, *infra*) on January 9, 2013.<sup>26</sup> The Commission began its investigation shortly thereafter.<sup>27</sup> In the ensuing months, SED issued a series of data requests to Comcast, seeking information as part of an informal investigation. While consistently maintaining that the Commission lacks jurisdiction over the Release, Comcast nevertheless cooperated with Commission staff in its investigation.<sup>28</sup> In April 2013, the AG's Office concurrently began an investigation into the same matter.

On October 3, 2013, the Commission issued an OII instituting this proceeding,<sup>29</sup> and adopted the SED's Staff Report.<sup>30</sup> On November 18, 2013, Comcast moved to dismiss the OII on the ground that the OII is prohibited by PU Code § 710 and is contrary to the Commission's longstanding policies and practices against applying traditional utility regulation to VoIP and

---

<sup>25</sup> Exh. Com 103/103C (Donato) at 10.

<sup>26</sup> Exh. Com 101/101C (Munoz) at 6.

<sup>27</sup> Motion to Dismiss Ruling at 2-3.

<sup>28</sup> Exh. Com 102 (Munoz) at 12-13.

<sup>29</sup> *See generally* OII and Scoping Memo.

<sup>30</sup> *See generally* Exh. SED 1/1C (Staff Report: Investigation of Comcast Phone of California, LLC, and Related Entities Concerning the Unauthorized Disclosure and Publication of Unlisted Telephone Numbers ("Staff Report")), which includes SED's allegations of facts related to the Release and recommendation to adopt the OII.

other IP-enabled services.<sup>31</sup> In the alternative, Comcast sought a dismissal of the Commission action on prudential grounds in light of the AG’s concurrent investigation.<sup>32</sup>

On February 11, 2014, the Assigned Commissioner issued a scoping memo and ruling, which set forth “the category, need for hearing, issues to be addressed and schedule of the proceeding, and designate[ing] the presiding officer.”<sup>33</sup> On March 11, 2014, ALJ Burcham denied Comcast’s Motion to Dismiss.<sup>34</sup>

Throughout the proceeding, SED continued to conduct discovery, including taking the depositions of three Comcast employees – Phil Miller, Valerie Cardwell, and Lisa Donato.<sup>35</sup> And in total, Comcast received and responded to over 300 SED data requests (“DRs”) and produced over 18,000 pages of documents.<sup>36</sup> At several points during the proceeding, Comcast also offered to engage in mediation or settlement discussions, which SED rejected.<sup>37</sup> On July 18, 2014, Comcast and SED served the prepared direct testimony of their respective witnesses. On September 5, 2014, Comcast and SED served rebuttal testimony of their respective witnesses.<sup>38</sup> Evidentiary hearings were held from October 1, 2014 to October 3, 2014 before ALJ Burcham.

---

<sup>31</sup> Motion to Dismiss of Comcast Phone of California, LLC (U-5698-C) and Its Related Entities (filed Nov. 18, 2013) (“Motion to Dismiss”) at 9.

<sup>32</sup> Motion to Dismiss at 22.

<sup>33</sup> Scoping Memo at 1.

<sup>34</sup> Motion to Dismiss Ruling at 21.

<sup>35</sup> Exh. Com 102 (Munoz) at 13.

<sup>36</sup> Exh. Com 102 (Munoz) at 12.

<sup>37</sup> See e.g., January 9, 2014, Prehearing Transcript (“First PHC Tr.”) at 66:7-28 (Comcast raising possibility of alternative dispute resolution); May 21, 2014, Prehearing Transcript (“Second PHC Tr.”) at 77:1-82:3 (Comcast stating that it would like to include alternative dispute resolution in the schedule and SED stating that it did not agree).

<sup>38</sup> In the days leading up to the evidentiary hearing, the parties exchanged corrected versions of the respective testimony.



### III. FACTUAL ISSUES

In October 2012, two XFINITY Voice customers notified Comcast that their non-published listings had been published.<sup>39</sup> After confirming that these numbers had appeared in Ecolisting notwithstanding the customers' request for non-published status, Comcast promptly conducted an investigation. As described in more detail below, that investigation revealed that the publication of these two customers' non-published listings was caused by a flaw in the process Comcast used for identifying non-published listings and that the error was systemic.<sup>40</sup> Thereafter, Comcast immediately engaged in extensive efforts to quickly fix the root cause of the Process Error, identify Affected Customers, delete the non-published listings from Ecolisting, and work with Neustar to ensure that other recipients of the non-published listing data deleted and destroyed the listings.<sup>41</sup> After identifying, notifying, and implementing a process to make refunds to Affected Customers, Comcast voluntarily notified the Commission and the AG's Office of the Release on January 9, 2013.<sup>42</sup>

#### A. The Inadvertent Release Resulted from an Anomaly in a Data Extraction Process Used to Identify Non-Published Directory Listings

In developing the directory listing data feed that Comcast used to provide listings to Neustar, Comcast relied, in part, on a pre-existing process that it had developed to send directory listings to rural telephone companies.<sup>43</sup> To determine a customer's status as either "published" or "non-published," the process used the customer's current account number to query (or search) a billing system table called the Phone Order Item ("POI Table"). The POI Table contains a record of all customer service orders by account number – including whether each customer has

---

<sup>39</sup> Exh. Com 104-104C (Donato) at 20, Att. N; Exh. SED 3C (Momoh), Att. DD.

<sup>40</sup> Exh. SED1/1C (Staff Report) at 4-5.

<sup>41</sup> Exh. Com 101/101C (Munoz) at 5-6.

<sup>42</sup> Exh. Com 101/101C (Munoz) at 6.

<sup>43</sup> *See generally* Exh. Com 103/103C (Donato) at 6 for a description of the process.

ordered a non-published listing.<sup>44</sup> The developers of this process did not realize, however, that when Comcast assigned a customer a *new* account number, that new account number in the POI Table did not reflect a customer's non-published order associated with the *prior* account number.<sup>45</sup> In those instances, the process searched the POI Table using the customer's *new* account number, did not find a non-published service order based on that account number, and defaulted the listing to published.<sup>46</sup>

In October and December 2009, Comcast merged its two California markets, and as part of the merger, issued all of its California customers new account numbers.<sup>47</sup> As a result, subsequent queries made to the POI Table using these California customers' *new* account numbers did not reflect non-published orders submitted under their old account numbers.<sup>48</sup> All California customers who elected non-published status prior to Comcast's 2009 account number changes defaulted to "published" status.<sup>49</sup> New customers (or those who elected non-published service) after that date were not affected.

Because the software engineers developed the data extraction process prior to the account number changes and were unaware of this anomaly in how the POI Table compiled non-

---

<sup>44</sup> Exh. Com 103/103C (Donato) at 6. Queries to other billing tables identified other portions of subscriber listing data – e.g., subscriber address. *Id.* at 6, 11; *see also* Exh. Com 104/104C (Donato) at 5.

<sup>45</sup> Comcast does not often make account number changes but does so occasionally for administrative reasons when merging markets and in connection with a municipality boundary realignment (to track the customer's jurisdiction for taxing purposes) among other reasons. Exh. Com 103/103C (Donato) at 11.

<sup>46</sup> Exh. Com 103/103C (Donato) at 12-13. By contrast, customers were not affected when *their* action (as opposed to Comcast's) resulted in the assignment of a new account number. For example, when a customer moves, the customer's old account is terminated and service is set up at the new address with a new account number and the new services, which are ordered at the time. Exh. Com 103/103C (Donato) at 11.

<sup>47</sup> Exh. Com 103/103C (Donato) at 12 and fn. 3.

<sup>48</sup> Comcast also made limited account number changes in other states on a much smaller scale, but not to the same extent as the mass account number change in California. That is why the number of XFINITY Voice customers affected by the Process Error in California was far greater than in any other state. *See* Exh. Com 103/103C (Donato) at 11-13; Comcast (Donato), Tr. at 393-396 (Oct. 2, 2014).

<sup>49</sup> Exh. Com 103/103C (Donato) at 12.

published status, they did not foresee how these two factors working in combination could affect queries used to extract directory listing information.<sup>50</sup>

## **B. The Extent and Duration of the Release of Non-Published Listings**

Unaware of the flaw in its data extraction process, Comcast unknowingly provided files that did not accurately reflect the non-published status of certain customer listings to two entities: (1) Frontier Communications, Inc., (“Frontier”) and (2) Neustar, in its capacity as Comcast’s listing distribution agent; Neustar then further distributed the listings as described below.<sup>51</sup> The duration of the Release was limited to the July 2010-December 2012 period (with an exception for distribution to Comcast’s affiliate Plaxo Inc. (“Plaxo”), which retained the listings for a few months into 2013).<sup>52</sup>

*Frontier’s Use of Listings.* Frontier used the listing information it received from Comcast in two regional printed directories, which were published in 2010 and 2011.<sup>53</sup> Approximately 1,400 non-published listings appeared in the 2011 phone book for Frontier Communications in Elk Grove, and one customer listing was published in the 2010 and 2011 Frontier Colusa County phonebook.<sup>54</sup> By the time Comcast discovered the Release (November 2012) and could take remedial actions (December 2012), the most recent Frontier directory containing non-published listings was more than one year old and had been superseded by new directories that did not

---

<sup>50</sup> Exh. Com 103/103C (Donato) at 13.

<sup>51</sup> Exh. Com 101/101C (Munoz) at 6; Exh. Com 103/103C (Donato) at 22.

<sup>52</sup> Exh. Com 104/104C (Donato), Att. C depicted the entities that received the non-published listings and the respective time periods of receipt, a copy of which is attached for convenience here as Appendix 2 (Chart of Recipients of Non-Published Listings and Periods of Release).

<sup>53</sup> Exh. Com 103/103 C (Donato) at 22. Although Frontier also received Comcast directory listings in late 2009, Comcast conducted a manual review of all of the listings sent to Frontier for that publication and confirmed that none of the non-published listings sent to Frontier in 2009 were published. Com 104/104C (Donato) at 17 and fn. 10.

<sup>54</sup> Exh. Com 101/101C (Munoz) at 7; Exh. Com 103/103C (Donato) at 22.

contain the erroneous listings.<sup>55</sup> In light of this fact and the relatively few affected listings in those outdated directories, Comcast did not attempt to retrieve the outdated Frontier directories from customers.

*Neustar's Use of Listings.* In its capacity as Comcast's directory listing distribution agent, Neustar provided the non-published listings back to Comcast for publication on Ecolisting, which was first made publicly available on July 1, 2010.<sup>56</sup> The non-published listings remained on the Ecolisting website until December 10, 2012, when they were removed.<sup>57</sup>

Neustar also distributed a subset of the non-published listings to two other parties for a more limited period of time. First, Neustar distributed non-published listings in November 2010 to kgb, Inc. ("kgb"), Comcast's directory assistance (i.e., 411) provider, which received the data for its live 411 operator service until late 2011/early 2012.<sup>58</sup> kgb deleted all Comcast directory listings, including the inadvertently released non-published listings, in January 2012.<sup>59</sup> Neustar also distributed listings to Plaxo, a Comcast affiliate, which used the listings in connection with its Plaxo Personal Assistant service<sup>60</sup> from approximately August 2011 through April 2013.<sup>61</sup>

---

<sup>55</sup> Exh. Com 103/103C (Donato) at 22 (noting the periods of publication).

<sup>56</sup> Exh. Com 103/103C (Donato) at 10, 25.

<sup>57</sup> Exh. Com 103/103C (Donato) at 15. Although Comcast had corrected the process by late November and directly sent a corrected file of listings to Ecolisting by early December, deleting the non-published listings and updating Ecolisting with the corrected listings took a few days. *Id.*

<sup>58</sup> Exh. Com 104/104C (Donato) at 8, fn.8 (noting that there is a discrepancy between Neustar's and kgb's accounts as to when kgb no longer received listings from Neustar); Exh Com. 104/104C (Donato), Att. D at ¶ 9 (Chudleigh declaration noting that "Neustar discontinued providing Comcast-sourced DL Records to kgb as of October 1, 2011"); Exh. Com. 107C (Miller) at Att. D. at Comcast POST-OII\_017541 ("Targus ceased sending kgb Comcast data on 1/27/2012").

<sup>59</sup> Exh. Com. 107C (Miller) at Att. D. at Comcast POST-OII\_017541.

<sup>60</sup> The Plaxo Personal Assistant (PA) Service periodically sends suggested updates to contact information in PA customers' online address books, for the PA customers to accept, reject, or ignore. *See* Exh. 101/101C (Munoz) at 6-7.

<sup>61</sup> Comcast discovered the provision of listings to Plaxo in the Spring of 2013 and immediately requested deletion of the listings upon discovery. Exh. Com 103/103C (Donato) at 23.

Based on the data that Plaxo had available,<sup>62</sup> approximately 44 non-published listings were utilized by Plaxo customers in the six month period immediately preceding Plaxo's deletion of the listings.<sup>63</sup>

Neustar also provided test files containing non-published listings to several other third parties, but Neustar confirmed with the third parties that these test files were never used and were subsequently destroyed.<sup>64</sup> There is no evidence that the non-published listings were distributed to any other party.<sup>65</sup>

### **C. Comcast First Identified the Process Error in November 2012**

Comcast learned of the Release in November 2012 while investigating two XFINITY Voice customers' reports that their non-published numbers had been published.<sup>66</sup> These customer contacts were logged in October 2012 in Comcast's customer care system as "tickets." Those tickets were ultimately brought to the attention of Ms. Lisa Donato, a product operations manager, who in March 2012 assumed responsibility for operational issues concerning directory listings for XFINITY Voice.<sup>67</sup> Ms. Donato promptly directed Comcast's software engineers to

---

<sup>62</sup> Plaxo does not archive its information for longer than six months. Therefore, it was only possible to determine how many suggestions with non-published data were accepted, rejected, or ignored between October 16, 2012 and April 17, 2013. Exh. Com 101/101C (Munoz) at 7, fn. 2.

<sup>63</sup> Exh. Com 103/103C (Donato) at 23.

<sup>64</sup> Exh. Com 103/103C (Donato) at 15, 21 and Att. H.

<sup>65</sup> E.g., Exh. Com 104/104C (Donato) at 6-8; Att. D at ¶¶ 4-10 (Chudleigh declaration stating that "[w]ith the exception of kgb, there were no sales or licenses entered into between Neustar and any other entities for Comcast-sourced subscriber DL Records for California customers prior to 2013 and Plaxo was the only other entity that received Comcast-sourced subscriber DL Records for California customers sourced for use or publication . . . prior to 2013"). Comcast used a different process to submit directory listings to other entities (such as ILECs or another vendor, LSSi), and those listings were not affected by the Process Error. Exh. Com. 101/101C (Munoz) at 16; Exh. Com 103/103C (Donato) at 8-9; Comcast (Munoz) Tr. at 348:5-25 (Oct. 2, 2014) (noting that there was a team that investigated the LSSi feed from the time that the Process Error was identified and "proved . . . that the LSSi feed was not affected by the process error.").

<sup>66</sup> Exh. Com 103/103C (Donato) at 3, Att. N; Exh. SED 3/3C (Momoh) at Att. DD.

<sup>67</sup> Exh. Com 104/104C (Donato) at 20.

determine the cause of the problem, and the engineers discovered the Process Error described above.<sup>68</sup>

Although SED asserts that Comcast should have discovered the Process Error sooner,<sup>69</sup> the evidence established that Comcast did not in fact do so.<sup>70</sup> While Comcast did hear from some customers who were affected by the Process Error before its discovery in late 2012, Comcast focused at that time on addressing these customers' individual concerns and correcting the status of their listings for print or online directories.<sup>71</sup> Comcast did not suspect that a larger problem was at the root of what appeared to be these isolated issues.<sup>72</sup>

The number of calls and trouble tickets that Comcast's customer care representatives received from Affected Customers regarding these non-published listings prior to time the Process Error was discovered was extremely low in proportion to the overall volume of customer care calls Comcast received and trouble tickets it opened for California customers. Specifically, from July 2010 (when the Process Error began) to the end of October 2012 (before the Process Error was discovered), Comcast received calls from fewer than 100 Affected Customers per year – which is a miniscule percentage of the 20 million calls to customer care that Comcast receives from California customers on an annual basis.<sup>73</sup> During the same time period, Comcast also opened a small number of trouble tickets for customers impacted by the Process Error --

---

<sup>68</sup> Exh. Com 103/103C (Donato) at 13-14, Att. D and E.

<sup>69</sup> Exh. SED 2/2C (Momoh) at 40.

<sup>70</sup> Exh. Com 103/103C (Donato) at 13-14; Exh. Com 104/104C (Donato) at 16-18.

<sup>71</sup> Exh. Com 106/106C (Stephens) at 18.

<sup>72</sup> See Exh. Com 106/106C (Stephens) at 18. ("And it appears that in most of these cases, the representative took affirmative steps to remove the customer from the relevant directory listings. See Exhibit [Attachment] H – Summary of CR Tickets for Customer Impacts by the Process Error listings. My sense is that the representatives believed that this corrected the problem by fixing the problem with the publisher.") See also Exh. Com 104/104C (Donato) at 16.

<sup>73</sup> See Exh. Com 106/106C (Stephens) at 10-11 and Att. A.

approximately 25 tickets per year<sup>74</sup> -- which is also a very small percentage of approximately 50,000 trouble tickets that Comcast opens in California on an annual basis.<sup>75</sup> These small number of isolated customer contacts failed to alert Comcast that there was systemic problem.

**D. Once the Error was Identified, Comcast Promptly Fixed it and Deleted the Listings**

Comcast personnel acted quickly once the Process Error was identified. By mid-November 2012, the XFINITY Voice product team and Comcast software engineers determined that the query to the POI Table was the root cause of the Release that led to the two October 2012 complainants' non-published numbers being published.<sup>76</sup> The engineers designed, tested, and implemented a revised directory listings extraction process, so that Comcast could send a corrected file of listings to Neustar by December 5, 2012.<sup>77</sup> Comcast also instructed Neustar to stop sending listings to publishers, and requested that it recover any recently-sent listings from publishers.<sup>78</sup> All non-published listings from the data feed to Neustar and Ecolisting were deleted by December 10, 2012, within a few days from when Comcast sent the corrected listings to Neustar.<sup>79</sup> In addition, Comcast asked Neustar to identify all entities that had received the listings<sup>80</sup> and required that all such listings be destroyed.<sup>81</sup>

**E. Comcast's Disclosures to Customers about Non-Published Service are Clear, Reasonable, and Consistent with Industry Practice**

As is explained below, Comcast clearly advises customers about its policies for its non-published offering: what non-published status is, how it works, and the limitations of such

---

<sup>74</sup> Exh. Com 106/106C (Stephens) at 17-18; Comcast (Stephens) Tr. at 543:3-6; 552:5-21 (Oct. 3, 2014).

<sup>75</sup> Comcast (Stephens) Tr. at 561:3-6 (Oct. 3, 2014).

<sup>76</sup> Exh. Com 103/103C (Donato) at Att. E, E-1.

<sup>77</sup> Exh. Com 103/103C (Donato) at 15, Att. D-2.

<sup>78</sup> Exh. Com 103/103C (Donato) at 15, Att. F-1, F-8.

<sup>79</sup> Exh. Com 103/103C (Donato) at 15.

<sup>80</sup> Exh. Com 103/103C (Donato) at 15, Att. F, F-1, F-8.

<sup>81</sup> Exh. Com 103/103C (Donato) at 15, Atts. F, G and H; Exh. Com 104/104C (Donato) at 9, Atts. F and G.



status. Information about Comcast's non-published offering is provided to customers when they initiate service, in annual notices, and is always available on Comcast's website. Moreover the non-published offering that Comcast provides is comparable to that offered by other communications providers, including ILECs.

Information about non-published status is contained in Comcast's Subscriber Agreement, Privacy Notice and XFINITY Voice Product Guide ("Product Guide").<sup>82</sup> For example, the 2010 Product Guide explained what non-published status is and how it works: "[n]on-published directory service ensures that Comcast will not submit your phone number to the phone book, online directories, or Directory Assistance."<sup>83</sup> Comcast's Privacy Notice specifically alerts customers that, while the company uses reasonable efforts to prevent publication, mistakes do happen: Comcast "takes reasonable precautions to ensure that non-published and unlisted numbers are not included in our telephone directories or directory assistance services, we cannot guarantee that errors will never occur."<sup>84</sup> Moreover, Comcast customers are also informed and specifically agree when they sign up for the service that if a mistake does happen, Comcast's liability for inadvertently disclosing a non-published phone number will be limited to the "CHARGES, IF ANY," that the customer has paid to "NOT PUBLISH THE INFORMATION FOR THE AFFECTED PERIOD."<sup>85</sup>

---

<sup>82</sup> Exh. Com 103/103C (Donato) at Att. A.; Att. B (Comcast Agreement for Residential Service and Privacy Notice); *see also* Staff Report at 11 and Att. 18 (quoting and providing a screen shot of the "Directory Listings Guidelines from Comcast's website which states that , "[i]f you want to keep your telephone number private, you can request 'non-published status.' This means your number will be made unavailable both in directories and directory assistance."")

<sup>83</sup> Exh. Com 103/103C (Donato) at Att. A.

<sup>84</sup> Exh. Com 103/103C (Donato) at Att. B, Att. B-6. SED's witness (Mr. Tien) likewise acknowledged the commonsense reality that "mistakes" may be made because "[n]obody is perfect." SED (Tien), Tr. at 27:2-13 (Oct. 1, 2014).

<sup>85</sup> Exh. Com 103/103C (Donato) at Att. B-20. (Comcast Terms of Service at Comcast) (capitalization in original).



The documents described in the preceding paragraph -- Comcast's Subscriber Agreement, Privacy Notice and XFINITY Voice Product Guide – are all included in the Welcome Kit, which is provided to new XFINITY Voice customers when they initiate service.<sup>86</sup> These documents – together with additional information about non-published status– are also always available on Comcast's website.<sup>87</sup> Customers also receive a copy of the Privacy Notice annually.<sup>88</sup>

Comcast's description of its non-published offering is essentially identical to that of its peers and competitors, including the ILECs.<sup>89</sup> For example, AT&T explains that “[n]on-published’ numbers are not available in the phone book or through Directory Assistance.”<sup>90</sup> Verizon's service is described similarly: “Your name, address, and telephone number are not published in the Verizon Directory White Pages. Your telephone number is not available from Directory Assistance (411).”<sup>91</sup> Both AT&T and Verizon moreover implicitly acknowledge that errors may occur with respect to directory listing, as reflected by their tariffs.<sup>92</sup> And, like Comcast, the ILECs also routinely limit their liability for directory listing errors. For example,

---

<sup>86</sup> Exh. Com 103/103C (Donato) at 5 (“the terms and conditions [Subscriber Agreement] and related Privacy Notice are provided to XFINITY Voice subscribers upon enrollment in the service”); Exh Com.106/106C (Stephens) at 29 (“We include it [Privacy Notice] in hard copy in each new customer Welcome kit.”); *see also* Exh. Com 103/103C (Donato) at Att. A. (Product Guide); Att. B (Comcast Agreement for Residential Service and Privacy Notice).

<sup>87</sup> See Exh Com.106/106C (Stephens) at 29 (describing how to access the privacy notice on the website); (Staff Report) at 11 and Att. 18.

<sup>88</sup> Exh Com.106/106C (Stephens) at 29 (“we distribute it [Privacy Notice] annually as a bill insert every January to every Comcast customer.”);

<sup>89</sup> Comcast (Munoz), Tr. at 356-357 (Oct. 2, 2014), Att. Com 112 and Com 113.

<sup>90</sup> Exh. Com 113 (AT&T Policy).

<sup>91</sup> See Exh. Com 112 (Verizon Policy).

<sup>92</sup> Appendix 3 - AT&T California, Rule 14– Limitation of Liability (Schedule Cal. P.U.C. Sheet No. 87-88) (available at: <http://cpr.att.com/pdf/cahist/ca/a002.pdf>) (limiting liability for any “errors,” omissions, delays, in services furnished by the Utility including “alphabetical directory listings”); *see also* Appendix 4 --Verizon California, Inc., Rule 26 – Limitation of Liability (Schedule Cal. P.U.C. Sheet No. 57, 57.1-57.4: <http://www.verizon.com/tariffs/PDFViewer.aspx?doc=175460>) (limiting liability for “errors” or “omissions” in alphabetical telephone directories). Comcast has concurrently filed a motion for the Commission to take official notice of these tariffs pursuant to Commission Rule 13.9 and Cal. Evid. Code Sections 452 and 453.

AT&T limits liability for errors associated with “alphabetical directory listings” to the amount “equal to the pro rata charges to the customer for the period during which the services or facilities are affected” by the error; and Verizon similarly limits liability for errors associated with listings in “alphabetical telephone directories furnished at additional charge” and “information records furnished at additional charge.”<sup>93</sup>

**F. Comcast Used Reasonable Efforts to Notify Customers, Refund Non-Published Fees, and Provide Redress Options**

After identifying and correcting the root cause of the Release and removing the non-published listings from Ecolisting, Comcast personnel acted reasonably and expeditiously to identify, notify, provide refunds to, and address the individual concerns of the Affected Customers.<sup>94</sup>

Comcast prioritized identifying Affected Customers with non-published listings posted on Ecolisting.<sup>95</sup> As Ms. Donato testified “we were concerned that these customers faced the most risk of being impacted by the publication since the listings reflected *their current address and phone number*.”<sup>96</sup> Comcast next turned to identifying customers whose non-published listings were previously published due to the Process Error, which was a far more difficult task.<sup>97</sup>

---

<sup>93</sup> See Appendix 3 --AT&T California, Rule 14– Limitation of Liability (Schedule Cal. P.U.C. Sheet No. 87-88) (available at: <http://cpr.att.com/pdf/cahist/ca/a002.pdf>); see also Appendix 4 --Verizon California, Inc., Rule 26 – Limitation of Liability (Schedule Cal. P.U.C. Sheet No. 57.3-57.4: <http://www.verizon.com/tariffs/PDFViewer.aspx?doc=175460>) (limits liability to amounts “not in excess of the charge for that listing [or information record] during the effective life of the directory [or information records] in which the error or omission occurred.”).

<sup>94</sup> Exh. Com 103/103C (Donato) at 17; see also Exh. Com 105/105C (Stephens) at 2.

<sup>95</sup> Exh. Com 103/103C (Donato) at 17. It was also substantially easier to identify these customers by comparing the last inaccurate data feed with the updated corrected data.

<sup>96</sup> Exh. Com 103/103C (Donato) at 17.

<sup>97</sup> Exh. Com 103/103C (Donato) at 18.

Comcast sent notification letters as soon as each subset of Affected Customers was identified.<sup>98</sup> In addition to these written notifications, Comcast placed automated telephone calls to all the Affected Customers who had any services with Comcast, because Comcast had a reliable current phone number for these customers.<sup>99</sup> Comcast also called the small subset of Affected Customers (approximately 44) whose non-published listings it verified were utilized by Plaxo.<sup>100</sup>

Comcast proactively and immediately credited all Affected Customers who had active accounts (for any Comcast service) with the amount the customer paid for non-published service.<sup>101</sup> For former customers – i.e., those who had terminated all Comcast services – the company sent notification letters to the customer’s last known address and offered to provide a refund upon the provision of a current address.<sup>102</sup>

Comcast also established a dedicated toll-free line that any Affected Customers could call if they had questions or needed further assistance.<sup>103</sup> This number was staffed with a specialized team of care agents who were dedicated to working with customers who called with concerns

---

<sup>98</sup> Exh. Com 103/103C (Donato) at 19- 21 at Att. I (copies of Phase 1 and 2 notification letters), Att. L (Plaxo notification letter) and Att. J (notification tracker related to the letters mailed and invoices); *see also* Exh. Com 105/105C (Stephens) at Att. B (Plaxo follow up letter); and Att. E (former employee letter).

<sup>99</sup> Exh. Com 105/105C (Stephens) at 5-6. Comcast did not contact former customers via telephone because it did not have a reliable contact number for former customers. Exh. Com 105/105C (Stephens) at 6; *see also* Comcast (Munoz), Tr. at 346:26 to 347: 5 (Oct. 2, 2014) (only ten percent of California customers who terminate their XFINITY Voice service retain their old telephone number).

<sup>100</sup> Com 105/105C (Stephens) at 6. Comcast also called the customers impacted through Plaxo, to explain the nature of the Plaxo PA service.


<sup>101</sup> Com 105/105C (Stephens) at 7. The refund covered the entire period their non-published information was inadvertently released. Exh. Com 105/105C (Stephens) at 9.

<sup>102</sup> Exh. Com 105/105C (Stephens) at 7-8.

<sup>103</sup> Exh. Com 105/105C (Stephens) at 11.

about the release of their non-published listings.<sup>104</sup> This specialized team established a unique escalation process for the handling of Affected Customers' issues (including safety concerns).<sup>105</sup>

Comcast received approximately 11,000 calls to its dedicated toll free line.<sup>106</sup> All Affected Customers who called in were offered a replacement phone number at no charge, and care agents were preauthorized to offer customers redress in the form of additional credits for up to eighteen (18) months of additional non-published service, as well as any current promotional offerings.<sup>107</sup>

In any case involving a customer who expressed a safety concern or where the specialized care agent could not immediately resolve the customer's concern, the agent escalated the matter to the Executive Customer Relations ("ECR") team.<sup>108</sup> (In total, approximately 760 customers were escalated to the ECR team.).<sup>109</sup> The ECR agents were directed to work with the customers to provide additional remedies to meet their individual needs. The ECR agents offered these customers a variety of additional remedies, additional service credits, reimbursements for home security systems (in the relatively few cases where customers requested such redress), and reimbursement for online identification-scrubbing services, among other things.<sup>110</sup> On average, escalated customers received approximately **[Begin Confidential]**  **[End Confidential]** of additional remedies.<sup>111</sup>

---

<sup>104</sup> Exh. Com 105/105C (Stephens) at 12.

<sup>105</sup> Exh. Com 105/105C (Stephens) at 11. Instructions were also provided to Comcast's Customer Care organization in the event any Affected Customers called Comcast's general customer service line, to transfer the Affected Customer to the specialized team in charge of this issue. *See id.* at 12 and Att. G thereto.

<sup>106</sup> Exh. Com 105/105C (Stephens) at 13.

<sup>107</sup> Exh. Com 105/105C (Stephens) at 14.

<sup>108</sup> Exh. Com 105/105C (Stephens) at 12.

<sup>109</sup> Exh. Com 105/105C (Stephens) at 15.

<sup>110</sup> Exh. Com 105/105C (Stephens) at 14-16, Atts. F – I; Exh. Com. 106/106C (Stephens) at 27-28.

<sup>111</sup> Exh. Com 105/105C (Stephens) at Att. I.

**G. Since Discovering the Release, Comcast has Strengthened Its Policies and Procedures to Protect Customers' Non-Published Listings**

Prior to the Release, Comcast had reasonable processes to prevent the disclosure of non-published listings, including: its process to identify non-published listings (notwithstanding the issues with the query to the POI Table); its contractual requirement that Neustar ensure that non-published data is not provided to licensees;<sup>112</sup> and procedures for addressing customer concerns regarding directory listings.<sup>113</sup> Using the Process Error and the Release as a highly regrettable learning experience, Comcast has since implemented various new safeguards specifically designed to further protect customers' non-published listings,<sup>114</sup> including the following:

1. Overhauling Data Extraction Process: Comcast has changed the process by which it creates the file of directory listing information provided to Neustar. This improvement eliminates the prior account number change issue that resulted in the Process Error.<sup>115</sup>
2. Conducting Full Data Refreshes: Comcast has provided Neustar full refreshes of the directory listings database to ensure the data stays current.<sup>116</sup>
3. Conducting Ecolisting Spot Checks: After discovering the Process Error, Comcast conducted five manual spot checks of affected telephone numbers and compared those numbers against the information in Ecolisting to confirm that the non-published listings had in fact been deleted. Of the more than 900 telephone numbers checked, no listings were inappropriately published.<sup>117</sup>
4. Validating Billing System Data: In July 2013, Comcast's billing system engineers reviewed the non-published queries and related data sources to confirm the

---

<sup>112</sup> Exh. SED-1/SED/1C (Staff Report), Att. 11, Section 2.3; Exh. Com 104/104C (Donato), at 13, Att. D at ¶ 12. However, directory assistance providers, such as kgb, require additional information such as name or address to confirm whether a customer is not published. Tr. (Chudleigh) at 397:24-298:16 (Oct. 2, 2014)

<sup>113</sup> Exh. Com 104/104C (Donato), Att. M.

<sup>114</sup> Exh. Com 104/104C (Donato) at 19.

<sup>115</sup> Exh. Com 103/103C (Donato) at 26.

<sup>116</sup> Exh. Com 103/103C (Donato) at 26-27 (refreshes were provided on April 22, 2013, November 22, 2013, March 25, 2014 and June 24, 2014). For the June 2014 refresh, Neustar utilized a high performance tool to compare the Comcast full refresh file against the existing Comcast data in Neustar's database.

<sup>117</sup> Exh. Com 103/103C (Donato) at 27.

accuracy of the queries; the experts from each system confirmed the proper functionality, mapping, and validity of the data provided.<sup>118</sup>

5. Improving Internal Communication: Comcast's XFINITY Voice Product team directed the engineers supporting the billing system and directory listing product to coordinate as to any future software or billing system updates.<sup>119</sup>
6. Implementing Training: Comcast developed and implemented a refresher training module that specifically reviews directory listing rules and order entry requirements.<sup>120</sup>
7. Implementing an Automated Reconciliation Tool: At Comcast's request, Neustar has deployed a high performance reconciliation tool to compare the Comcast full refresh file with the existing Comcast listing data from Neustar's database. The most recent comparison was run and showed no mismatches. Comcast and Neustar are working to implement this tool on regular intervals.<sup>121</sup>
8. Developing an Almost Instantaneous (Near Real-Time) Delivery Process: Comcast is developing a near real-time delivery process for directory listings that will allow Comcast to send, and Neustar to update, its systems at the same time.<sup>122</sup>
9. Improving the Ecolisting Platform: Comcast made a number of changes to the Ecolisting platform to improve the accuracy of its directory listings. These included eliminating the vendor that previously supported Ecolisting and having Neustar take on that vendor's responsibilities. This change served to streamline the process by eliminating the transfer of listing data between the separate vendors. As a result, Neustar is expected to (i) provide improved search functionality; and (ii) reduce the time to update listings (from 6 to 4 days).<sup>123</sup>
10. Root Cause Analyses: Both Comcast and Neustar have implemented new procedures to identify instances where escalated non-published or directory listing complaints may indicate a systemic issue.<sup>124</sup>

---

<sup>118</sup> Exh. Com 103/103C (Donato) at 27.

<sup>119</sup> Exh. Com 103/103C (Donato) at 27- 28.

<sup>120</sup> Exh. Com 103/103C (Donato) at 28.

<sup>121</sup> Exh. Com 103/103C (Donato) at 28-29.

<sup>122</sup> Exh. Com 103/103C (Donato) at 30. This will replace the process of sending one daily file to Neustar, and Comcast will also implement procedures to validate that data is received as well as fallout procedures in the event a record cannot be processed. *Id.* at 31 (currently slated for implementation by year end 2014).

<sup>123</sup> Exh. Com 103/103C (Donato) at 30. This transition required extensive testing from January through May 2014 to ensure that Comcast listing data was properly processed and managed for the new site. The testing included verifications that no listings were displayed for Comcast non-published numbers Exh. Com 103/103C (Donato) at 31.

<sup>124</sup> Exh. Com 103/103C (Donato) at 30-31.

11. Commissioning Internal Audits: Comcast commissioned its internal audit team to conduct an assessment of the company’s current policies, practices, and procedures regarding directory listings.<sup>125</sup>

In sum, Comcast has dedicated a considerable amount of time and expense to improving its processes and policies—all with the goal of preventing the type of error that resulted in the Release from ever happening again.<sup>126</sup>

#### **IV. LEGAL ARGUMENT**

##### **A. The Commission Lacks Jurisdiction Over this Matter**

##### **1. Section 710 Bars this Investigation**

As a threshold legal issue, Comcast maintains that the Commission lacks jurisdiction to conduct this investigation on the grounds that it is an exercise of impermissible regulatory jurisdiction or control over VoIP and is therefore statutorily barred by PU Code § 710. Rather than reiterating in full the arguments set forth in Comcast’s motion to dismiss<sup>127</sup>—which were rejected by the Motion to Dismiss Ruling—highlighted below are (i) key aspects of Comcast’s jurisdictional arguments, as informed by the record evidence; and (ii) certain errors in the Motion to Dismiss Ruling.

As Comcast previously explained, PU Code § 710 unambiguously states: “The commission *shall not exercise regulatory jurisdiction* or control over Voice over Internet Protocol and Internet Protocol enabled services,” except in narrowly tailored circumstances far removed from the present situation.<sup>128</sup> This proceeding specifically contemplates exposing

---

<sup>125</sup> Exh. Com 103/103C (Donato) at 31.

<sup>126</sup> See Exh. Com 103/103C (Donato) at 26-31; Exh. 101/101C (Munoz) at 19.

<sup>127</sup> Incorporated by reference are arguments made in Comcast’s Motion to Dismiss. Comcast Motion to Dismiss at 1-25; Reply of Comcast Phone of California, LLC (U 5698 C) and Related Entities to Responses to Motion to Dismiss (filed Dec. 20, 2013) (“Reply Supporting Motion to Dismiss”) at 1-14.

<sup>128</sup> PU Code § 710(a) (emphasis added); see also Comcast Motion to Dismiss at 9.



Comcast entities to potential liability for the Release,<sup>129</sup> and that, in turn, entails the purported “exercise [of] regulatory jurisdiction or control over Voice over Internet Protocol and Internet Protocol services.”<sup>130</sup> By its plain text, the Public Utilities Code forbids this.

The Motion to Dismiss Ruling’s primary rationale for concluding that this action is not foreclosed by Section 710 was that, as SED had argued, “[t]his OII does not address VoIP or IP-enabled services,” but instead “addresses local interconnection service provided pursuant to a CPUC-issued CPCN.”<sup>131</sup> The unremarkable fact that Comcast Phone provides “interconnection service” to Comcast IP for VoIP service is not, however, a basis for the Commission’s jurisdiction over this matter.<sup>132</sup> PU Code § 239 defines a VoIP service as one in which users may receive calls from or send them to the PSTN; thus, VoIP services *inherently* require interconnection with a regulated “telephone corporation” to the PSTN.<sup>133</sup> As Comcast explained in its Motion to Dismiss, allowing the Commission to exercise “regulatory jurisdiction or control”<sup>134</sup> over VoIP service whenever a regulated entity provides “interconnection” as part of that service would nullify Section 710 and undermine this State’s strong policy against subjecting innovative VoIP services to traditional utility regulation.<sup>135</sup> If the Legislature had intended to allow broad Commission regulation of integral aspects of a VoIP service offering, it would not have expressly preserved in Section 710(c) the Commission’s narrow authority to

---

<sup>129</sup> The Commission’s OII states that it intends to “consider whether the Commission should impose a fine or other remedies” following its proposed investigation. OII at 2.

<sup>130</sup> PU Code § 710(a).

<sup>131</sup> Motion to Dismiss Ruling at 14.

<sup>132</sup> See Reply Supporting Motion to Dismiss at 6-8.

<sup>133</sup> PU Code § 239(a)(1)(C) (VoIP definition includes requirement that service “[p]ermits a user generally to receive a call that originates on the public switched telephone network and to terminate a call to the public switched telephone network.”). Section 239 thus contemplates that VoIP calls may be made from or to the PSTN—which by its nature, requires interconnection with a telecommunications carrier.

<sup>134</sup> PU Code § 710(a).

<sup>135</sup> See Comcast Motion to Dismiss at 4-6.



regulate specifically enumerated aspects of VoIP and IP-enabled services (such as battery backup disclosures, E911, and PUC surcharges).<sup>136</sup> The Commission's assertion of jurisdiction cannot be reconciled with the statutory text or the legislative intent.

Moreover, the Commission's legal theory (*i.e.*, that it can evade Section 710's prohibition on VoIP regulation by exercising regulatory jurisdiction over an "interconnection" component of the interconnected VoIP service at issue here) is fundamentally inconsistent with the actual focus of this proceeding. This investigation is about the inadvertent Release of customers' non-published listings and the impact of that Release on *end-user VoIP* customers; it is *not* about the interconnection services that Comcast Phone provides to customer Comcast IP and the impact of those wholesale services on Comcast IP.

The Commission's own staff correctly applied Section 710 when they repeatedly recognized that Section 710 precludes the Commission from investigating the very Release of VoIP listings at issue here. In response to customer queries about the Release, the Commission's Consumer Affairs Branch ("CAB") responded that it could not assist customers because "[t]he Commission does not have jurisdiction over ... Voice Over Internet Protocol (VOIP)."<sup>137</sup> In another instance, the Commission's staff wrote in a letter that was sent approximately eight months after SED began its investigation into the Release:

The Consumer Affairs Branch of the California Public Utilities Commission (CPUC [sic] received your complaint against Comcast. *Because your service is provided with a technology known as Voice over Internet Protocol or "VoIP" our ability to assist you is limited.*

---

<sup>136</sup> PU Code § 710(c). Conversely had the Legislature intended for the Commission to have jurisdiction over VoIP directory listings, it would have included directory listings within the enumerated exceptions in Section 710 (c).

<sup>137</sup> Exh. Com 101/101C (Munoz) at 9 and Att. A. Notably, the Commission staff took the same position even before the passage of Section 710.

We did send your complaint to Comcast and requested their assistance in resolving your complaint.

By state law, enacted by the Legislature on September 12, 2012 and signed by Governor Edmond G. Brown Jr., *the CPUC cannot regulate VoIP services*. The specific law is SB1161, which created section 710 of the Public Utilities Code.

*This means that we cannot require Comcast to respond to us...*<sup>138</sup>

In the face of this evidence, the only response SED is able to muster is that these admissions are “not bind[ing] on the Commission,” coupled with speculation that CAB staff may not have been aware of Comcast Phone’s alleged role.<sup>139</sup> That misses the point. Regardless of whether the admissions—which SED concedes were made<sup>140</sup>—technically bind the Commission, they reflect that Commission staff concluded that the Commission *cannot* regulate VoIP services (including the VoIP listings at issue), the point Comcast has been making from the outset. If, as the staff concluded, the prohibition on VoIP regulation bars the Commission from requiring Comcast even to respond to customer complaints about the publication of non-published numbers, it surely bars the Commission from pursuing an enforcement action that seeks to hold Comcast *liable—and potentially subject to penalties*—for the same conduct that gave rise to the complaints.

For all these reasons, this investigation should be dismissed.

## **2. The Commission Lacks Authority to Enforce the California Constitution’s Right to Privacy**

Even if Section 710 did not bar this action, the Commission’s constitutional privacy claim must be dismissed for lack of jurisdiction. In its Motion to Dismiss, Comcast

---

<sup>138</sup> Exh. Com 101/101C (Munoz), Att. A-7 (emphasis added). The CAB letter was sent on *September 12, 2013*—several months *after* Commission staff had begun its informal investigation – and clearly acknowledged the impact of Section 710.

<sup>139</sup> Exh. SED 6/6C (Christo) at 42.

<sup>140</sup> Exh. SED 6/6C (Christo) at 42.

demonstrated that the Commission lacks authority to enforce the provisions of the California Constitution safeguarding the right to privacy.<sup>141</sup> The Motion to Dismiss Ruling did not address this argument; rather, it merely concluded that “[t]he state Constitution is ... a law of general applicability because it applies to all persons in California.”<sup>142</sup>

Comcast respectfully submits that this misconstrues the argument it made in its Motion to Dismiss: under SED’s theory, Section 2101 is the sole basis for the Commission’s supposed authority to enforce the right to privacy under the California Constitution.<sup>143</sup> But, as Comcast explained, Section 2101 limits the Commission’s power to enforcing constitutional and statutory provisions “*affecting public utilities*.”<sup>144</sup> To the extent that constitutional provisions are concerned, the grant of authority in Section 2101 can only be reasonably understood as referring to Article XII of the state Constitution. Article XII is specifically entitled “Public Utilities,” and it sets forth (among other things) the powers of the Commission. Indeed, it is not surprising that the Legislature would have entrusted the Commission with enforcement of the “Public Utilities” Article—and *only* that Article—of the California Constitution. Moreover, there is no precedent that establishes that the Commission has authority to enforce the constitutional right to privacy. In fact, this appears to be the first case in which the Commission has claimed the authority to enforce a freestanding right to privacy under the Constitution.<sup>145</sup> Neither SED in its briefing on

---

<sup>141</sup> See Motion to Dismiss at 14-17; Reply Supporting Motion to Dismiss at 11.

<sup>142</sup> Motion to Dismiss Ruling at 17.

<sup>143</sup> Response of the Safety and Enforcement Division to Comcast’s Motion to Dismiss (filed Dec. 6, 2013) (“SED Response to Motion to Dismiss”) at 13 (citing PU Code § 2101); *see also* OII at 16 and fn. 74 (same).

<sup>144</sup> PU Code § 2101 (“The commission shall see that the provisions of the Constitution and statutes of [the] state *affecting public utilities*, the enforcement of which is not specifically vested in some other officer or tribunal, are enforced and obeyed”) (emphasis added). By contrast, the Attorney General is vested with much broader powers to “see that the laws of the State are uniformly and adequately enforced.” Cal. Const. Art. V, section 13. Indeed, for that very reason, Comcast has not disputed the Attorney General’s jurisdiction to conduct an investigation into the Release.

<sup>145</sup> See Motion to Dismiss at 15 and fn. 49.

Comcast’s Motion to Dismiss nor the Motion to Dismiss Ruling cited any authority for this unprecedented assertion of regulatory authority. As a result, even assuming that the constitutional right to privacy were “a law of general applicability,”<sup>146</sup> the Commission has no power to enforce it because the right to privacy is contained in Article I of the Constitution (among the “Bill of Rights”) — *not* the “Public Utilities” Article XII.

This is consistent with the Commission’s own precedent, which has recognized that the Commission’s enforcement power—in contrast with that of the Attorney General and District Attorneys—is sharply circumscribed: “[t]he Commission is *limited to pursuing enforcement actions under the P.U. Code and our rules*,” while, by contrast, the Attorney General and District Attorneys “may bring actions not only under the P.U. Code, but also under general anti-fraud laws and the criminal code.”<sup>147</sup> While constitutional rights may inform the Commission’s actions in enforcing the PU Code,<sup>148</sup> the Commission may not arrogate to itself an enforcement power that neither the Constitution nor the PU Code confers.<sup>149</sup>

---

<sup>146</sup> Motion to Dismiss Ruling at 17.

<sup>147</sup> *OIR to Establish Consumer Rights and Protection Rules Applicable to All Telecommunications Utilities*, D.06-03-013 (emphasis added; footnote omitted). To the extent that the Commission seeks to hold Comcast liable for publication for a *privacy violation* due to the publication of the non-published numbers in Ecolistings.com—an online directory—agency precedent also forecloses any such attempt. In *Knell v. Pacific Bell and AT&T*, D.03-08-025 ), the Commission expressly disavowed jurisdiction over Internet directory publishing, and therefore declined to decide whether AT&T had violated the complainant’s privacy rights when it “released information that allowed Complainant’s residential number to be published in directory assistance ... and on AT&T’s Internet directory [Anywho.com].” D.03-08-025, *mimeo* at 24 (Concl. of Law No. 6) (footnote omitted). In doing so, the Commission explicitly acknowledged that “under present regulatory circumstances, Internet services are ‘offered in an arena *unregulated by this Commission* or any other State or Federal regulatory body.’” *Id. mimeo* at 15 (emphasis added).

<sup>148</sup> Commission decisions have recognized that customers of public utilities have privacy rights (including rights under the state Constitution) and have discussed such rights in framing the statutory obligations of public utilities. *See, e.g., OII of Competitive Access to Customer List Information*, D.01-07-032, *mimeo* at 14-15. However, as discussed above, the Commission has never enforced the Constitutional right to privacy as a stand-alone claim.

<sup>149</sup> *See* Motion to Dismiss at 15-16, at fn. 49.

In sum, even if the statutory ban on regulating VoIP and IP-enabled services did not preclude the Commission from imposing liability on Comcast, the Commission still lacks authority to bring an enforcement action seeking to enforce a freestanding right to privacy under the California Constitution. The privacy claim therefore must be dismissed.

**B. SED Must Demonstrate by a Preponderance of the Evidence That Comcast Phone Violated the Law**

Even if the Commission were to find that it has jurisdiction over this matter, SED can establish liability only by showing by a preponderance of the evidence that Comcast Phone violated the law.<sup>150</sup> The Commission (and specifically ALJ Burcham) may consider all available evidence,<sup>151</sup> including hearsay, such that “a reasonable person would rely upon ... in the conduct of serious affairs.”<sup>152</sup> Nevertheless, its factual findings must be based on “substantial evidence” in the record.<sup>153</sup> SED has failed to show by a preponderance of the evidence that Comcast Phone violated the law.

**C. Even Assuming it Has Jurisdiction, the Commission Cannot Establish Any Violation of Law**

**1. The Commission Cannot Establish a Violation of the Constitutional Right to Privacy**

The Commission’s constitutional privacy claim also fails on the merits. Assuming for the sake of argument that the Commission had authority to enforce the California Constitution’s right to privacy, “[a]ctionable invasions of privacy” under the California Constitution “must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an

---

<sup>150</sup> See *OII into the Operations, Practices, and conduct of Telseven, LLC et al.*, D.14-08-033, *mimeo* at 9 (finding that SED bears the burden of proof by preponderance of evidence).

<sup>151</sup> See *Bercovitch v. SDG&E*, D.00-04-029 (personal knowledge admissible).]

<sup>152</sup> See also *Application of PG&E and Contra Costa Amended Purchase and Sale Agreement*, D.13-04-032, *mimeo* at 10-12.

<sup>153</sup> See *OII into Whether the Operating Authority of David Martinez Espinoza should be revoked*, D.98-04-044, 1998 Cal PUC LEXIS 409 at \*7 (Commission finding that substantial evidence must support each allegation in an OII).

egregious breach of the social norms underlying the privacy right.”<sup>154</sup> This is a “‘high bar’ for establishing an invasion of privacy claim.”<sup>155</sup>

“Even disclosure of very personal information has not been deemed an ‘egregious breach of social norms’ sufficient to establish a constitutional right to privacy” claim.<sup>156</sup> Further, applying this demanding standard, courts have rejected constitutional privacy claims as a matter of law even where the disclosures involved personal information such as social security numbers,<sup>157</sup> home addresses,<sup>158</sup> and geolocation information and unique identifier numbers for mobile devices.<sup>159</sup> And courts have found that, “[e]ven negligent conduct that leads to theft of highly personal information ... does not ‘approach [the] standard’ of actionable conduct under the California Constitution and thus does not constitute a violation of [individuals’] right to privacy.”<sup>160</sup>

Contrary to the assertions of one SED witness,<sup>161</sup> Comcast’s conduct in releasing the non-published listings was not even negligent. Its conduct certainly was not so irresponsible nor was the Process Error so foreseeable that Comcast’s conduct was reckless:<sup>162</sup> as explained in detail above, Comcast had reasonable procedures in place to protect against the disclosure of non-

---

<sup>154</sup> *Hill v. Nat’l Collegiate Athletic Ass’n*, 7 Cal. 4th 1, 37, 39-40 (1994).

<sup>155</sup> *In re Yahoo Mail Litig.*, 2014 WL 3962824, \*15 (N.D. Cal. Aug. 12, 2014); *see also In re iPhone Application Litig.*, 844 F. Supp. 2d 1040, 1063 (N.D. Cal. 2012).

<sup>156</sup> *In re Yahoo Mail Litig.*, 2014 WL 3962824 at \*15 (citations omitted).

<sup>157</sup> *See Ruiz v. Gap, Inc.*, 540 F. Supp. 2d 1121, 1128 (N.D. Cal. 2008), *aff’d*, 380 Fed. Appx. 689 (9th Cir. 2010).

<sup>158</sup> *See Folgelstrom v. Lamps Plus, Inc.*, 195 Cal. App. 4th 986, 922 (Cal. Ct. App. 2011).

<sup>159</sup> *See In re iPhone Application Litig.*, 844 F. Supp. 2d at 1063.

<sup>160</sup> *In re iPhone Application Litig.*, 844 F. Supp. 2d at 1063 (citation omitted).

<sup>161</sup> *See* Exh. SED 4/4C (Tien) at 7-8. This is a characterization which Comcast vigorously disputes. *See* p. 23, *supra*, Section III (A).

<sup>162</sup> *See Delaney v. Baker*, 20 Cal. 4th 23, 31-32 (1999) (“‘Recklessness’ refers to a subjective state of culpability greater than simple negligence, which has been described as a ‘deliberate disregard’ of the ‘high degree of probability’ that an injury will occur.”) (internal citations omitted); *see also* Rest.2d Torts, § 500, com. (g) at 590 (“reckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man.”).

published listings, but experienced an unforeseen problem with its data extraction process in the unique circumstances of the Comcast-initiated account number changes.

Regardless, Comcast's conduct certainly did not even begin to approach the sort of "egregious breach of social norms" required to establish a constitutional privacy claim.<sup>163</sup> That claim therefore fails as a matter of law.

## **2. The Commission Cannot Establish a Violation of PU Code §§ 2891.1 or 2891**

The Commission's Section 2891.1 claim fares no better. Section 2891.1 prohibits a "telephone corporation selling or licensing" directory listings from including the "telephone number of any subscriber assigned an unlisted or unpublished access number."<sup>164</sup> Section 2891.1 on its face applies only to telephone corporations, and the Commission cannot extend its requirements to a VoIP provider or VoIP service. Moreover, Comcast Phone's purported role in the Release does not provide a basis for a Section 2891.1 claim for two independent reasons.<sup>165</sup> *First*, Section 2891.1 does not apply where, as here, a regulated telephone corporation did not sell or license *its own* non-published listings. *Second*, under the LIS agreement that governs Comcast Phone's provision of local interconnection service to Comcast IP, neither the provision nor monitoring of the accuracy of non-published listings is part of the interconnection service that Comcast Phone provides. Comcast Phone therefore cannot be held liable for violating Section 2891.1. Nor can the Commission establish a Section 2891 violation.

---

<sup>163</sup> *In re Yahoo Mail Litig.*, 2014 WL 3962824 at \*15 (citations omitted).

<sup>164</sup> PU Code § 2891.1(a).

<sup>165</sup> Notably, neither Section 2891.1 nor any of the other PU Code provisions that the Commission alleges Comcast violated are included among the narrowly defined class of statutes that are excluded from Section 710's prohibition on VoIP regulation. *See* PU Code § 710(c) and (d); *see also* Motion to Dismiss at 12-17.



- a. *Section 2891.1(a) does not apply where, as here, a regulated telephone company did not sell or license its own unlisted/unpublished numbers.*

PU Code § 2891.1(a) provides that, unless a subscriber waives protection under this provision, “a telephone corporation selling or licensing lists of residential subscribers shall not include the telephone number of any subscriber assigned an unlisted number or an unpublished access number.” The legislative history shows that Section 2891.1(a) was enacted to address the problem of regulated telephone companies selling or licensing their subscribers’ unlisted numbers to telemarketers. As the bill summary of the provision that ultimately became Section 2891.19(a) notes,

The author (sponsor) introduced AB 936 in response to concerns raised about information obtained by telemarketing agents. This bill would specify that lists which are sold by a telephone company to customers must exclude “unlisted” numbers and must also exclude the numbers of telephone subscribers who request their telephone numbers be “unpublished.”

A few years ago, the announcement by local telephone companies in California about their intentions to sell lists of subscribers’ telephone numbers generated public criticism from various groups and individuals. Presently Pacific Bell and GTE California say they do not “sell” lists; however, the practice of providing telephone numbers for a charge to those who seek lists of specific addresses still occurs, according to the author.<sup>166</sup>

In crafting a statutory provision to accomplish this objective, the Legislature was careful to focus on the problem of telephone companies selling or licensing *their own* lists of subscribers with unlisted numbers. The same bill summary explains that the provision “would specifically prohibit a telephone corporation which sells lists of *its* residential subscribers from including the

---

<sup>166</sup> Appendix 5 (Cal. State and Consumer Services Agency, Dept. Consumer Affairs, Enrolled Bill Rep. on Assem. Bill No. 936 (1989-90 Reg. Sess.) June 30, 1989 at 1.) See also Appendix 6 (Assem. Com. on Utilities and Commerce, Rep. on Assem. Bill No. 936 (1989-90 Reg. Sess.) as introduced Apr. 17, 1989 at 2 (“The bill serves as a complement to a package of bills relating to the perceived problems surrounding telemarketing calls and unsolicited facsimile transmission.”)).



telephone number of any subscriber with an unpublished or unlisted access number, as defined, without his or her consent, except in specified instances.”<sup>167</sup> This is also reflected in the statutory text. As noted above, Section 2891.1(a) provides that “*a telephone corporation* selling or licensing lists of residential subscribers shall not include the telephone number of *any subscriber assigned an unlisted or unpublished access number.*” Section 2891.1(h), in turn, defines such a number as one “assigned to a subscriber *by a telephone or telegraph corporation....*” Thus, reading the two provisions together, the term “any subscriber” in subsection (a) refers to a subscriber of the “telephone corporation” that assigned the numbers at issue.

Here, however, it is undisputed that Comcast Phone did *not* assign the non-published numbers that were inadvertently released and the customers at issue were not *that* company’s customers. Rather, “Comcast IP assigns [the non-published numbers] to its residential XFINITY Voice subscribers.”<sup>168</sup> In other words, the inadvertently published numbers at issue here are those of Comcast IP’s customers, and Comcast IP is not a telephone corporation. Because Section 2891.1(a), by its terms, applies to a telephone corporation’s sale or licensing of *its own* subscriber lists, there can be no liability under that provision here.<sup>169</sup> That conclusion is also

---

<sup>167</sup> Appendix 5, *supra* fn. 166.

<sup>168</sup> Motion to Dismiss Ruling at 6-7 (citing OII at 5; emphasis added).

<sup>169</sup> The Commission cannot circumvent these obstacles by relying on the theory that Comcast IP aided and abetted a violation by Comcast Phone. As an initial matter, Section 2111 exposes entities “other than a public utility” to secondary liability for the *illegal* conduct of a public utility whose actions they assist; non-utilities may be held liable for knowingly aiding and abetting a “violation” of the PU Code. *See* PU Code § 2111 (emphasis added). But, as explained above, there is no predicate violation by Comcast Phone here. Comcast Phone did not perform an element of a Section 2891.1 violation—selling or licensing its own subscriber lists. Moreover, to hold an entity (here, Comcast IP) liable for supposedly aiding and abetting a violation by another party requires proof of actual knowledge of the specific violation that the entity allegedly assisted. *See* PU Code § 2111 (applying to every non-utility who “*knowingly ... aids or abets any violation of ... any provision ... of this part, ... or who procures, aids, or abets any public utility in the violation*”) (emphasis added); *see also* *Casey v. U.S. Bank Nat’l Ass’n*, 127 Cal. App. 4th 1138, 1145, 26 Cal. Rptr. 3d 401, 406 (2005) (“California courts have long held that liability for aiding and abetting depends on proof the defendant had actual knowledge of the specific

consistent with the legislative policy underlying Section 710—to preclude Commission regulation of services provided by VoIP providers such as Comcast IP – while enabling the Commission to focus its resources on regulated telecommunications services provided by telephone corporations.

Finally, this case is also far removed from the paradigmatic situation that Section 2891.1 was enacted to address (the sale or licensing of unlisted numbers to telemarketers for economic gain).<sup>170</sup> This is clearly not what was at issue in terms of the Process Error, an inadvertent release from which Comcast did not profit, underscoring that there was no violation of that provision here.

*b. Even if this investigation focuses solely on Comcast Phone’s provision of interconnection service, Comcast Phone still cannot be held liable for violating Section 2891.1.*

The Commission’s theory of a Section 2891.1 violation fails for an additional and independent reason. In denying Comcast’s Motion to Dismiss, this Presiding Officer ruled that “[t]his OII does not address VoIP or IP-enabled services,” but instead “addresses local interconnection service provided pursuant to a CPUC-issued CPCN.”<sup>171</sup> As explained above, the OII goes well beyond the local interconnection service. But, even assuming *arguendo* that the action were indeed confined to Comcast Phone’s provision of interconnection service to Comcast IP, Comcast Phone cannot be held liable for violating Section 2891.1(a). That is because,

---

primary wrong the defendant substantially assisted” and “requires a defendant to reach a *conscious decision to participate in tortious activity* for the purpose of assisting another in performing a wrongful act”) (citation omitted). SED introduced no evidence showing that Comcast IP made a *conscious or knowing* decision to assist Comcast Phone in releasing unlisted/unpublished numbers. To the contrary, the evidence shows the release was entirely inadvertent. *See* Section III(A), *supra*.

<sup>170</sup> *See* Exh. Com 104/104C (Donato) at Att. D ¶¶ 4-5. Although Neustar sent test files of Comcast’s listings to a telemarketer, it was in error, and such files were destroyed. *Id.* at ¶ 7; Exh. Com 103/103C (Donato) at 22.

<sup>171</sup> Motion to Dismiss Ruling at 14; *see also id.* at 5 (recounting SED argument that “the service at issue is local interconnection service”), 7-8 (SED argument that “it was not the provision of VoIP services that resulted in the alleged privacy violations at issue here, but rather the imprudent provision of local interconnection service including improper management of phone numbers by Comcast Phone.”).

pursuant to the agreement governing Comcast Phone’s provision of interconnection service to Comcast IP, the responsibility for the accuracy of the listing information squarely lies with Comcast IP.

Specifically, the agreement that defines Comcast Phone’s interconnection service (the LIS Agreement) makes clear that Comcast Phone has no role whatsoever in entering, validating, or maintaining correct subscriber listings information; instead, it is Comcast IP’s responsibility to perform those functions.<sup>172</sup> That allocation of responsibility is hardly surprising; as explained above, the non-published numbers at issue here were those of Comcast IP’s customers—not Comcast Phone’s customers – and, generally speaking, the provider of an interconnection service would have no reasonable way to validate the accuracy of the VoIP provider’s end user customer’s listings.

It necessarily follows from these undisputed facts that the provision of validated directory listings is not part of the “interconnection service” that Comcast Phone provides. Thus, even under SED’s own theory, the provision of interconnection service on which this investigation purportedly focuses does not include any role for Comcast Phone in entering, validating, or maintaining correct customer listings information. As a result, Comcast Phone cannot be liable for violating Section 2891.1.

---

<sup>172</sup> See Exh. SED 1/1C, Att. 10 (Section 1.5B) (providing that the “Customer” [i.e., Comcast IP] “shall input, validate and maintain accurate Subscriber information so that Comcast [Comcast Phone] can provide such Customer-provided information to applicable national databases. . . .”); Exh. Com 101/101C (Munoz) at 14 (“[t]he LIS Agreement makes clear that the Customer (Comcast IP) has the responsibility for the accuracy and validity of the subscriber information . . . .”); *see also* Motion to Dismiss Ruling at 7 fn.13 (relying on LIS agreement to define respective roles of Comcast Phone and Comcast IP). Mr. Munoz’s testimony confirming this fact was unrebutted at the hearing. The *only* testimony introduced by SED that even touched on the issue was from Nathan Christo, who simply stated: “I am not an attorney, so I cannot address the legal aspects of Mr. Munoz’s testimony” on this subject. Exh. SED 6/6C (Christo) at 42.

c. *SED has not alleged that Comcast violated Section 2891 and, thus this claim fails as a matter of law.*

The Commission's allegation that Comcast violated PU Code § 2891 warrants little discussion. Section 2891 prohibits a telephone corporation from disclosing without a residential customer's consent, information such as customer's call records, credit or personal information, or services that a customer purchases.<sup>173</sup> The information protected by Section 2891 is distinct and apart from the non-published listings protected by Section 2891.1 and is instead similar to data protected under federal law as customer proprietary network information ("CPNI").<sup>174</sup> There is no evidence on the record that Comcast disclosed such data protected by Section 2891 - nor does SED claim that it has. This claim therefore fails as a matter of law.

### **3. The Commission Cannot Establish a Violation of PU Code § 451**

Section 451 provides, in relevant part, as follows:

All charges demanded or received by any public utility ... or any service rendered or to be rendered shall be just and reasonable.... Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities ... as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.

As the Commission has observed, "§ 451's 'reasonable service' requirement involves fact-specific analysis."<sup>175</sup> In the instant case, that fact specific analysis establishes that Comcast had reasonable processes in place to prevent the disclosure of non-published listings and that the disclosure of those listings occurred from an unanticipated flaw in Comcast's data extraction process in unique circumstances. The evidence also shows that Comcast had reasonable processes in place for addressing customer calls and complaints regarding non-published service.

---

<sup>173</sup> See PU Code § 2891(a)(1), (2), (3).

<sup>174</sup> See 47 U.S.C. § 222.

<sup>175</sup> *OII of Pacific Bell d/b/a Cingular*, D.04-09-062, *mimeo* at 74-75.

As an initial matter, Comcast had reasonable processes and procedures in place to prevent the disclosure of non-published listings. The evidence in fact demonstrates that Comcast had established a variety of different mechanisms intended to identify non-published listings and to prevent the publication of such. Comcast had implemented reasonable processes to identify non-published listings (“POI Table Query”), and to ensure that its agent Neustar exclude such listings from publication.<sup>176</sup> Importantly as well, the POI Table Query did work properly and would have continued to work properly but for the impact of the subsequent account number changes.<sup>177</sup> Comcast reasonably did not anticipate that the account number changes would impact the reliability of the POI table as a data source since (i) the POI Table Query appeared to have worked properly when initially implemented;<sup>178</sup> (ii) Comcast rarely initiates account number changes;<sup>179</sup> and (iii) the large scale account number change in California occurred after the query was implemented.<sup>180</sup>

Comcast also had reasonable processes for addressing customer concerns about non-published service.<sup>181</sup> Pursuant to these processes, Comcast’s representatives addressed customers’ issues individually.<sup>182</sup> The number of customer calls and trouble tickets, moreover, did not suggest a systemic issue.<sup>183</sup> However, once Comcast identified the Process Error and realized it was a systemic issue, Comcast took immediate steps to correct it, delete the non-

---

<sup>176</sup> See Exh. Com103/103C (Donato) at 13, Att. D at ¶ 12.

<sup>177</sup> See Exh. Com 104/104C (Donato) at 4-5.

<sup>178</sup> Before implementing any new software or query, Comcast routinely tests such changes. See, e.g., Exh. Com. 103/103C (Donato), at Att. E-5 (noting that it would take “a fair amount of testing of the data” to ensure that the revised query for identifying non-published listings would not affect other data).

<sup>179</sup> Exh. Com103/103C (Donato) at 11.

<sup>180</sup> See Exh. Com103/103C (Donato) at 12-13; Exh. Com 104/104C (Donato) at 4-5.

<sup>181</sup> See Exh. Com106/1106C (Stephens) at 7-8; Exh. Com104/104C (Donato), Att. M.

<sup>182</sup> Exh. Com106/106C (Stephens) at 18.

<sup>183</sup> See Exh. Com106/106C (Stephens) at 13-21.

published listings, and provide remedies to its customers.<sup>184</sup> Comcast has also taken significant steps to prevent the problem from happening again.<sup>185</sup> Under these circumstances, the Commission cannot find a violation of Section 451.

**D. No Penalty Should Be Imposed**

A public utility that violates a Commission order or the PU Code is subject to a penalty of anywhere from \$500 to no more than \$50,000 for each offense.<sup>186</sup> The Commission may consider the following factors in establishing fines/penalties: (i) the role of precedent; (ii) the severity of the offense; (iii) the utility's conduct; (iv) the deterrent impact of a penalty on a utility, given its financial resources; and (iv) the totality of the circumstances in light of the public interest.<sup>187</sup>

As explained above, there is no basis for the Commission to find any violation of the law here. But *even if* the Commission were to find a violation of law with respect to the Release of non-published listings, due to numerous mitigating factors, the Commission should *not impose* any penalty on Comcast. The evidence demonstrates that the error was inadvertent;<sup>188</sup> Comcast did not profit from the Release;<sup>189</sup> upon discovery, Comcast took immediate steps to correct the error, and notify and provide remedies to the Affected Customers;<sup>190</sup> Comcast voluntarily

---

<sup>184</sup> Exh. Com103/103C (Donato) at 4.

<sup>185</sup> Exh. Com103/103C (Donato) at 26-31.

<sup>186</sup> PU Code § 2107.

<sup>187</sup> *See Re Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates*, D.98-12-075, 1998 Cal PUC LEXIS 1018.

<sup>188</sup> Exh. Com 104/104C (Donato) at 3-5.

<sup>189</sup> Exh. Com 107C (Miller) at 3.

<sup>190</sup> Exh. Com 103/103C (Donato) at 14 (correcting the Process Error); Exh. Com 105/105C (Stephens) at 5-8 (notifying and providing remedies to Affected Customers).

reported the Release to the Commission,<sup>191</sup> and Comcast cooperated with SED's informal and formal investigation.<sup>192</sup>

### **1. Commission Precedent Establishes that No Penalty is Appropriate**

The Commission first must ensure that any penalty it contemplates imposing is consistent with precedent.<sup>193</sup> Two Commission decisions have addressed the inadvertent publication of non-published listings, and both declined to impose penalties on the telephone corporation.<sup>194</sup>

One decision on point is D.01-11-062, which addressed Cox California Telcom., L.L.C.'s ("Cox") inadvertent release of approximately 11,000 of its customers' non-published listings to Pacific Bell Telephone Company ("Pac Bell") (an ILEC on whose behalf directories were published for customers within its incumbent service territory). As in this case, the release was caused by a computer systems error. Upon discovery of its error nine months later, Cox notified Pac Bell, which did *not* stop distributing printed directories even though Pac Bell knew the phone books included non-published listings. As a result, Cox asked the Commission to issue a temporary restraining order requiring Pac Bell to halt its distribution. While the Commission initially considered finding Cox negligent for providing the non-published listings to Pac Bell and Pac Bell to have violated Section 2891.1 for distributing the listings,<sup>195</sup> it ultimately did not reach these issues and found that *no penalty was appropriate* for either Cox or Pac Bell (despite Pac Bell's continued knowing distribution of non-published listings) because, among other

---

<sup>191</sup> Exh. Com 101/101C (Munoz) at 6.

<sup>192</sup> Exh. Com 102 (Munoz) at 12-14.

<sup>193</sup> D.98-12-075, 1998 Cal PUC LEXIS 1018 at \*60.

<sup>194</sup> *OIR into Competition for Local Exchange Service (Interim Opinion Relating to Pacific Bell and Cox Tainted San Diego Directories)*, D.01-11-062; *Knell v. Pacific Bell and AT&T*, D.03-08-025.

<sup>195</sup> D.01-11-062, *mimeo* at 16-17.

things, the companies had redressed the error,<sup>196</sup> and “a penalty phase might have the perverse effect of reawakening public anxiety about the tainted directory problem” and further harm Cox’s customers “as a result of the attendant publicity.”<sup>197</sup>

In *Knell*, the Commission similarly declined to impose a penalty even after finding that AT&T Communications of California, Inc. (“AT&T”) had violated Section 2891.1 when it mistakenly included its customer’s unlisted residential address in directory assistance and in an online directory (Anywho.com) for over a year.<sup>198</sup> The sole remedy the Commission imposed was an order that AT&T refund the complainant the non-published fees and to file a report detailing its compliance with Section 2891.1.

Similar to the foregoing cases, the Commission should determine that no penalty is warranted in this case, even if it were to find a violation of the law. Here, as in the Cox case, the publication of non-published listings was accidental and was caused by a computer systems error in unique circumstances, which was not detected for a period of time. Like Cox, upon learning of the Process Error, Comcast directed its distributor Neustar to stop distributing the non-published listings and worked to delete the listings from Ecolisting and other recipients.<sup>199</sup> Comcast (like Cox) also reimbursed the Affected Customers it was able to locate; and Comcast (like Cox) offered additional remedies for customers who contacted the company, including

---

<sup>196</sup> D.01-11-062, *mimeo* at 28-29 (Conclusions of Law 1-5). Cox offered customers free telephone number changes and 120 free prepaid minutes to call and update contacts as to the number change; or alternately for customers who desired to keep their numbers, one year of free caller ID, call-blocking, call-rejection or acceptance, and call-waiting features. *Id.*, *mimeo* at 8.

<sup>197</sup> D.01-11-062, *mimeo* at 21.

<sup>198</sup> D.03-08-025. The customer’s residential number was published in directory assistance from April 2000 and June 2000 and between May 18 and June 7, 2001, and his address in the Internet directory “on or around June 24, 2001.” As noted above (*see* fn. 147, *supra*), the Commission dismissed a privacy claim on the ground that Internet services are unregulated by the Commission. Unlike this case, *Knell* did not involve VoIP service.

<sup>199</sup> While in the Cox case, Cox and Pac Bell made efforts to reclaim phone directories, Comcast discovered the Release at least a year (or more) after distribution of the Frontier phone directories and after they had already been replaced with new books; therefore, the need to reclaim the outdated books is lower and the burden to do so more significant.



changing customers' phone numbers for free, promotional packages and other additional service credits/monetary remedies.<sup>200</sup> In fact, as best as Comcast can determine,<sup>201</sup> for the customers who contacted the company, Comcast provided remedies comparable to and in some cases above the amounts provided in these prior cases with an average amount of additional remedy of [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL].<sup>202</sup> For example, in some cases, for customers who had unique safety concerns, Comcast reimbursed customers [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] for security-related remedies.<sup>203</sup>

**2. Comcast's Voluntary Reporting, Rectification of the Error, and Full Cooperation in this Proceeding Confirm No Penalty is Appropriate**

No penalty should be imposed for the additional reason that Comcast proactively disclosed its discovery of the Process Error to the Commission (as well as the AG's Office), rectified the violation, and cooperated with the investigations conducted by both regulators throughout the past 19-20 months.<sup>204</sup>

Comcast has also taken significant steps to provide redress to Affected Customers and correct the listings. In addition, the company has implemented numerous improvements to its processes in order to prevent future inadvertent releases.<sup>205</sup> As the Commission determined in the Cox case, the providers' efforts to remove the listings from circulation and their "representation that mechanisms are now in place to deal promptly with any future 'customer-

---

<sup>200</sup> Exh. Com 106/106C (Stephens) at 23.

<sup>201</sup> Cox offered its customers who had safety concerns additional potential remedies, which were filed under seal. D.01-11-062, *mimeo* at 8.

<sup>202</sup> Exh. Com 106/106C (Stephens) at 22.

<sup>203</sup> Exh. Com 106/106C (Stephens) at 23, at Att. M.

<sup>204</sup> See Section II(B), *supra*; see also *Re Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates*, D.98-12-075, 1998 Cal. PUC LEXIS 1016 at \*56-59.

<sup>205</sup> See Section III(G), *supra*.

affecting events” were factors weighing against the imposition of *any* penalty.<sup>206</sup> They require the same result here.

### **3. There Was No Unaddressed Serious Harm**

In determining whether to impose a penalty, the Commission often considers whether there was significant harm (including economic or physical harm to consumers). As in the Cox case, consideration of this factor confirms that no penalty should be imposed here.

While Comcast does not dispute that the Release caused substantial concern for consumers, nor does it attempt to minimize the Process Error, SED has failed to cite evidence that customers suffered physical or economic harm that Comcast did not redress or offer to redress through the extensive measures described above (including offering to pay for alarm systems and other protective measures in appropriate cases).<sup>207</sup>

### **4. A Penalty Is Not Necessary for Effective Deterrence**

The Commission has acknowledged that a primary purpose of fines is to deter misconduct, and that, in determining the size of the fine, it shall consider the financial resources of the utility and constitutional limitations on excessive fines.<sup>208</sup> It has also recognized that where, as here, a utility incurs great expense in rectifying a problem, that itself is a substantial deterrent against future misconduct. In the Cox case, for example, the Commission noted that the costs Cox incurred to reclaim directories was “as substantial a deterrent as any fines we would be likely to impose under § 2107.”<sup>209</sup> Even where Pac Bell (an ILEC with considerable financial resources) had incurred much less than Cox in remediating the problem, the

---

<sup>206</sup> D.01-11-062, *mimeo* at 22.

<sup>207</sup> See Section III(F), *supra*.

<sup>208</sup> See D.98-12-075, 1998 Cal PUC LEXIS at\*59.

<sup>209</sup> D.01-11-062, *mimeo* at 19.

Commission determined that Pac Bell's costs provided it sufficient incentive not to engage in the same conduct in the future.

The same logic applies here. Comcast has devoted substantial resources, time, and energy toward fixing the Process Error; redressing customer concerns; and substantially overhauling its systems to create an improved process. The amount of resources and energy that Comcast has expended over the past two years itself serves as a powerful deterrent against any recurrence of similar problems.

##### **5. The Totality of the Circumstances Weigh in Favor of Mitigating any Penalty**

While Comcast strongly believes that Commission precedent requires no imposition of a penalty here, at the very least, these considerations must significantly mitigate the size of any penalty. In short:

- the Release was entirely inadvertent and resulted from a systems error;
- Comcast did not profit from the Release and received only nominal revenues from the provision of California customers' non-published listings— less than **[Begin Confidential]** **[End Confidential]** for the 2010-2012 period;<sup>210</sup>
- Comcast acted quickly to investigate and correct the error once it discovered the issue;
- Comcast implemented an active notification plan to Affected Customers;
- Comcast credited current Affected Customers while informing former Affected Customers of the availability of refunds and made additional remedies available to all customers; and
- Comcast implemented a number of process and system improvements including improved processes and procedures for escalating directory listing problems, transition to one vendor for Ecolisting, creation of a process for root cause analyses of problems, and additional training.

---

<sup>210</sup> Exh. Com 107/107C (Miller) at 12.

In light of these factors, as in the Cox case, the Commission should not impose a penalty. If the Commission nevertheless finds that a penalty is warranted, it should consider all of the foregoing factors to mitigate the penalty.

## **V. CONCLUSION**

As explained above, this matter is clearly foreclosed by Section 710 and the Commission should dismiss this proceeding against Comcast. If the Commission does not dismiss this proceeding, it should find that SED has failed to demonstrate by a preponderance of the evidence that Comcast or its affiliates violated the law. Finally, even if the Commission were to find that there were a violation of law, the Commission must follow precedent to impose no penalty, or, alternately, substantially mitigate the penalty.

Respectfully submitted this 4<sup>th</sup> day of November, 2014.

Peter Karanjia  
Michael Sloan  
Davis Wright Tremaine LLP  
1919 Pennsylvania Avenue, N.W.,  
Suite 800  
Washington, D.C. 20006-3401  
Tel: (202) 973-4200  
Fax: (202) 973-4499  
Email: peterkaranjia@dwt.com  
          michaelsloan@dwt.com

\_\_\_\_\_  
/s/  
Suzanne Toller  
Jane Whang  
Garrett Parks  
Davis Wright Tremaine LLP  
505 Montgomery Street, Suite 800  
San Francisco, CA 94111-6533  
Tel. (415) 276-6500  
Fax. (415) 276-6599  
Email: suzannetoller@dwt.com  
          janewhang@dwt.com  
          garrettparks@dwt.com

Attorneys for Comcast

## **APPENDIX**

Appendix 1 - Comparison of approved brief outline and Comcast outline.

Appendix 2 - Chart of Recipients of Non-Published Listings and Period of Release.

Appendix 3 - AT&T California, Rule 14 – Limitation of Liability (Schedule Cal. P.U.C. Sheet No. 87) (available at: <http://cpr.att.com/pdf/cahist/ca/a002.pdf>).

Appendix 4 - Verizon California, Inc., Rule 26 – Limitation of Liability (Schedule Cal. P.U.C. Sheet No. 57: <http://www.verizon.com/tariffs/PDFViewer.aspx?doc=175460>).

Appendix 5 - Cal. State and Consumer Services Agency, Dept. Consumer Affairs, Enrolled Bill Rep. on Assem. Bill No. 936 (1989-90 Reg. Sess.) June 30, 1989 at 1.

Appendix 6 - Assem. Com. on Utilities and Commerce, Rep. on Assem. Bill No. 936 (1989-90 Reg. Sess.) as introduced Apr. 17, 1989 at 2.